United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

OCTOBER TERM, 1905.

No. 1624.

EDWARD LANDVOIGT, APPELLANT,

vs.

JOSEPH PAUL.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 9, 1905.

In the Court of Appeals of the District of Columbia.

EDWARD LANDVOIGT, Appellant,
vs.
JOSEPH PAUL.
} No. 1624.

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a Supreme Court of the District of Columbia.

EDWARD LANDVOIGT, Plaintiff,
vs.
JOSEPH PAUL, Defendant.
} At Law. No. 44021.

UNITED STATES OF AMERICA,
District of Columbia,
} *ss*:

Be it remembered, that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:—

1 *Declaration, Notice to Plead.*

Filed July 2, 1900.

In the Supreme Court of the District of Columbia.

EDWARD LANDVOIGT, Plaintiff,
vs.
JOSEPH PAUL, Defendant.
} At Law. No. 44021.

The plaintiff sues the defendant for money payable by the defendant to the plaintiff for that whereas heretofore, to wit: on or about the 25th day of May, A. D. 1897, the defendant was seized and possessed of the following land and premises situate in the District of Columbia, to wit: lots 10 to 24, both inclusive, of Joseph Paul's subdivision of lots 1, 7, 8 and 9 in block 5 of Dobbins' addition to Washington, the same being the east front of said block on 1st street, northwest, by the depth of 90 feet; and being so seized and possessed, the defendant on the said 25th day of May, A. D. 1897, did sell to the plaintiff the south 99.35 feet of the said land (being lots 20 to 24, both inclusive, of said Paul's subdivision) and in and by a certain agreement in writing, executed in duplicate,

and bearing date the day and year aforesaid, and signed by the plaintiff of the one part and by the defendant, by the name and style of "Joseph Paul, agent," of the other part, it was mutually agreed by and between the plaintiff and the defendant that
2 if the plaintiff should complete the construction of five dwelling houses by him proposed to be built on five lots, each 19.87 by 90 feet at the northwest corner of V and First streets, northwest (being the same property last hereinbefore mentioned as sold by the defendant to the plaintiff) according to plans and specifications to be approved by the defendant, by the 1st day of October, A. D. 1897, then the defendant agreed to sell to the plaintiff by the 1st day of December, 1897, five other lots, each 19.87 by 90 feet, adjoining said buildings on the north (the same being lots 15 to 19, both inclusive, of said Paul's said subdivision) for the sum of $500. each, provided the plaintiff should on or before the 1st day of December, A. D. 1897, begin the erection of five dwelling houses thereon of similar construction to the five buildings first hereinbefore mentioned, or according to plans and specifications to be approved by the defendant, and that the plaintiff should complete the said last mentioned five dwelling houses with proper dispatch; and that if the plaintiff should complete the said additional five dwelling houses by the 1st day of April, A. D. 1898, then the defendant agreed to sell to the plaintiff on or before the 1st day of April, A. D. 1898, five other lots, each 19.87 by 90 feet adjoining the said last mentioned dwelling houses on the north (the same being lots 10 to 14, both inclusive, of said Paul's said subdivision) for the sum of $500. each, provided that the plaintiff, on or before the 1st day of April, A. D. 1898, should begin the erection of five dwelling houses of similar construction, or others according to plans and specifications to be approved by the defendant, and that the plaintiff
3 should complete the same with proper dispatch; and it was further understood and agreed therein by and between the plaintiff and the defendant that the said agreement should not be recorded among the land records of the District of Columbia:

And the plaintiff says that he, the plaintiff, has not recorded, or caused to be recorded, the said agreement in writing among the said land records, and that he, the plaintiff caused plans and specifications to be made for fifteen dwelling houses to be erected on the said land, and the same were submitted to, and approved by, the defendant, and the plaintiff procured a sewer to be laid on said 1st street in front of the proposed fifteen dwelling houses. And the plaintiff proceeded to erect the first five of the said dwelling houses according to the said plans and specifications, but the same were not fully completed by the 1st day of October, A. D. 1897, and on the said last mentioned day the defendant, agreed in writing with the plaintiff that the time for the completion of the said first five dwelling houses was extended to the 31st day of October, A. D. 1897, and the plaintiff further says that the said five houses were fully completed according to the said plans and specifications before the said 31st

day of October, A. D. 1897. And the plaintiff further says that at the time of the making of the aforesaid agreement in writing of date May 25, A. D. 1897, it was intended, and fully understood and agreed by and between the plaintiff and the defendant that the purchase price of $500. for each of said lots should be paid by the plaintiff, $200. in cash, and for the balance, $300., the plaintiff was to give his notes, secured by deed of trust on the property sold,
4 subject, nevertheless, and subsequent to a building loan of $4,000., on each of the nine interior lots, and of $5,000., on the corner lot, said building loan to be secured by first deeds of trust on said lots, and forasmuch as by the said agreement in writing of date May 25, A. D. 1897, it might appear that the plaintiff was to pay the sum of $500. in cash for each of the said ten lots, a supplemental or explanatory agreement in writing was made and entered into by and between the plaintiff and the defendant, bearing date on or about the 31st day of October, A. D. 1897, whereby it was stipulated and agreed, in accordance with the said understanding and agreement of the plaintiff and the defendant, that the plaintiff was to pay $200. cash for each of said ten lots, and give his notes for $300. on each of said lots, to be secured by deed of trust thereon subsequent to the said building loan; and that thereafter the said supplemental agreement was lost, and although diligent search has been made therefor, the same can not be found.

And the plaintiff further says that in the latter part of October, A. D. 1897, it was verbally agreed between him and the defendant that the defendant should sell and convey to the plaintiff all ten of the said lots, on the terms aforesaid, to wit: $200. cash and $300. secured by second deed of trust on each lot, and the plaintiff, relying on the said agreements made by him with the defendant, procured the said building loan, amounting to $41,000., and ordered the preparation of all necessary conveyances, deeds and other paper writings, and on or about the 1st day of November, A. D. 1897, the plaintiff, together with his wife, and the said defendant met for the purpose of signing, executing and delivering the said deeds,
5 conveyances and paper writings necessary to convey, or cause to be conveyed to the plaintiff the said lands, and to secure the payment of the said loans and deferred payments; but the defendant, at that time, would not convey, or cause to be conveyed, the said land to the plaintiff, and the plaintiff says that although, he, the plaintiff, was then and for a long time thereafter, ready, able and willing and offered to perform in every particular the things and respective parts in the said agreements required to be by him done and performed, yet the defendant, although frequently requested by the plaintiff so to do, would not and did not, and has utterly failed and refused, and still refuses to convey, or cause to be conveyed, as he was and is in duty bound, and never would convey or cause to be conveyed, the said land to the plaintiff, according to the terms of the said agreements. Wherefore, and by reason of the premises, the plaintiff says he is injured and has sus-

tained damages to the amount of $20,000., with interest from the 1st day of November, A. D. 1897, and, therefore, he brings his suit.

And the plaintiff claims $20,000, with interest thereon from the 1st day of November, A. D. 1897, besides the costs of suit.

SAM'L MADDOX,
Attorney for Plaintiff.

The defendant is to plead hereto on or before *me* twentieth day, exclusive of Sundays and legal holidays, occurring after the day of the service hereof; otherwise judgment.

SAM'L MADDOX,
Attorney for Plaintiff.

6 *Amended Declaration.*

Filed November 1, 1901.

In the Supreme Court of the District of Columbia.

EDWARD LANDVOIGT, Plaintiff,
vs.
JOSEPH PAUL, Defendant.
} At Law. No. 44021.

(With the leave of the court first had and obtained the plaintiff files this his amended declaration.)

The plaintiff sues the defendant for money payable by the defendant to the plaintiff, for that whereas heretofore, to-wit: on or about the 25th day of May, A. D., 1897, the defendant was seized and possessed of the following land and premises situate in the District of Columbia, to-wit: lots 10 to 24 both inclusive, of Joseph Paul's sub-division of lots 1, 7, 8 and 9 in block 5, of Dobbins' addition to Washington, the same being the east front of said block on first street, northwest, by the depth of 90 feet; and being so seized and possessed, the defendant on the said 25th day of May, A. D., 1897, did sell to the plaintiff the south 99.35 feet of said land (the same being lots 20 to 24, both inclusive, of said Paul's said sub-division), in and by a certain agreement in writing, executed in duplicate, and bearing date the day and year aforesaid, and signed by the plaintiff of the one part and by the defendant, by the name and style of "Joseph Paul, agent," of the other part, it was

7 mutually agreed by and between the plaintiff and the defendant that if the plaintiff should complete the construction of five dwelling houses by him proposed to be built on five lots, each 19.87 by 90 feet, at the southwest corner of V and First streets, northwest (being the same property hereinbefore mentioned as sold by the defendant to the plaintiff) according to plans and specifications to be approved by the defendant, by the 1st day of October, A. D., 1897, then the defendant agreed to sell to the plain-

tiff by the first day of December, A. D. 1897, five other lots, each 19.87 by 90 feet, adjoining said buildings on the north (the same being lots 15 to 19, both inclusive, of said Paul's said sub-division) for the sum of $500 each, provided the plaintiff should, on or before the first day of December, A. D., 1897, begin the erection of five dwelling houses thereon of similar construction to the five buildings first hereinbefore mentioned, or according to plans and specifications to be approved by the defendant, and that the plaintiff would complete the said last mentioned five dwelling houses with proper dispatch; and that if the plaintiff should complete the said additional five dwelling houses by the first day of April, A. D., 1898, then the defendent agreed to sell to the plaintiff on or before the first day of April, A. D. 1898, five other lots, each 19.87 by 90 feet adjoining the said last mentioned five dwelling houses on the north (the same being lots 10 to 14, both inclusive, of said Paul's sub-division) for the sum of $500 each, provided that the plaintiff, on or before the first day of April, A. D. 1898, should begin the erection

8 of five dwelling houses of similar construction, or others according to plans and specifications to be approved by the defendant, and that the plaintiff should complete the same with proper dispatch; and it was further understood and agreed between the plaintiff and the defendant that the said agreement should not be recorded among the land records of the District of Columbia.

And the plaintiff further says that forasmuch as it did not appear in and by said agreement in writing, of date as aforesaid, May 25, 1897, how the said sum of $500 should be paid for each of said lots, and that the same might be construed as requiring all cash, a further supplemental or explanatory agreement in writing was then and there, to wit, on said day, signed by the defendant, and delivered to the plaintiff, wherein and whereby the defendant agreed that the said sum of $500 for each of said lots should be paid as follows, to wit: $200 in cash at the time of making the transfer of the title to said lots, and for the remaining $300, balance of purchase price of each of said lots, the plaintiff should give the defendant his promissory notes to be secured by deed of trust on the property sold; subject, nevertheless, and subsequent to a building loan of $4000 on each of the interior nine lots (being said lots 11 to 19, both inclusive) and of $5000 on the corner lot (being said lot 10), said building loan to be secured by first deeds of trust on said lots.

And the said plaintiff says that he, the plaintiff has not recorded, or caused to be recorded, the said agreement in writing among the said land records, and that he, the plaintiff, caused plans and specifications to be made for fifteen dwelling houses to be erected by the

9 plaintiff on the said land, and the same were submitted to, and approved by, the defendant, and the plaintiff procured a sewer to be laid on said First street in front of the proposed fifteen dwelling houses, in part execution of his contract for their erection.

And the plaintiff proceeded to erect the first five of said dwelling houses according to the said plans and specifications, but the same were not fully completed by the first day of October, A. D., 1897, and on the said last mentioned day the defendant agreed in writing with the plaintiff that the time for the completion of the said first five dwelling houses was extended to the 31st day of October, A. D. 1897, and the plaintiff further says that the said first five dwelling houses were fully completed according to said plans and specifications before the said 31st day of October, A. D., 1897.

And the said plaintiff further says that at the time of entering into said agreement in writing, of date, as aforesaid, May 25, 1897, as was well known to the defendant at the time, it was his, the plaintiff's intention to ereet ten dwelling houses, one on each of said ten lots, according to plans and specifications approved by the defendant, and that such proposed erection of said houses was the principal consideration of said agreement and contract, as well to the plaintiff because of the great gains and profits he would have made upon a sale of the houses when completed, as to the defendant because of the increased value which was expected to accrue and would have accrued to other vacant ground by him owned, near to and adjoining the ground so as aforesaid, agreed to be sold to the plaintiff, by reason of the improvement in the values of all neighboring property from the erection of said houses.

And the plaintiff further says that in the latter part of October, A. D., 1897, it was further agreed between him and the said defendant, that the defendant should convey to the plaintiff all ten of said lots, to-wit: said lots 10 to 19, both inclusive, on the terms aforesaid, to-wit: $200 cash and $300 secured by second deed of trust on each of said lots, and that the plaintiff should thereupon begin the erection of the ten houses yet remaining to be built under and in accordance with the said contract in that behalf of date May 25, 1897, as aforesaid. And the plaintiff, relying on the said agreements made with him by the defendant, procured the said building loan, amounting to $41,000, and ordered the preparation of all necessary conveyances, deeds and other paper writings, and on or about the 1st day of November, A. D. 1897, the plaintiff, together with his wife, and the said defendant met for the purpose of signing, executing and delivering the said conveyances, deeds and paper writings necessary to convey, or cause to be conveyed, to the plaintiff the said lots, and to receive the payment of the said loans and deferred payments, the plaintiff being then and there ready and willing to do any and every act or thing required of him in the premises in and by said contract; but the defendant at that time would not convey or cause to be conveyed the said lots to the plaintiff, although he, said plaintiff, was then, and for a long time thereafter, ready, able and willing and offerred to perform in every particular the things and respective parts in the said agreements required to be by him done and performed.

11 And the plaintiff further says that the said ten houses, when completed, could readily have been sold for from six to seven thousand dollars each, there being at the time a brisk demand for houses of the character proposed to be built by the plaintiff, in that vicinity and that at said selling price the plaintiff would have realized a profit of to-wit fully $2500 on each of said ten houses, all of which was lost to the plaintiff by reason of the aforesaid refusal of the defendant to comply with his part of said contract of date aforesaid the 25th day of May, A. D., 1897.

And the plaintiff further says that he had entered into all contracts for material and labor necessary in and about the erection and completion of said houses, the same to be paid for out of said building loans from time to time as the work progressed, and that he had and did, prior to the said first day of November, A. D., 1897, agree to sell divers of said houses for the sum of to-wit $6500, said price to be paid when and as soon as the said houses should have been completed, said price representing a profit to the plaintiff on each of said houses of, to-wit $2500 per house, and that the rest of said houses not so agreed to be sold, would have rented for, to-wit, $50 per month each, and could readily have been rented for that figure, and that said gain and profits from the said contracts to sell said houses and the profits to be derived from their rentals were lost to the plaintiff by reason of the defendant's neglect and refusal to convey said lots as aforesaid.

And the plaintiff further says that on, to-wit, the first day of November, A. D., 1897, the said ten lots so agreed to be conveyed
12 to the plaintiff were worth, to-wit, 75 cents per square foot, and that the plaintiff, by reason of said neglect and default of the defendant failed to reap and lost the benefit and advantage of said advance in price to the damage of the plaintiff of at least $1000 per lot.

And the plaintiff further says that by means and in consequence of such neglect and refusal, as aforesaid, on the part of the defendant, the plaintiff hath been deprived of all benefit and advantage which would have arisen to him from the performance of his said contract by the defendant, and from the erection and completion of said ten houses, and has necessarily lost much time and been put to great expense, amounting in the whole to a large sum of money, by reason of being unable to undertake other work in his business as contractor and builder because of his said outstanding contracts for the material and labor needed for the erection and completion of said ten houses, while endeavoring to procure the conveyance to him by the defendant of the said ten lots; yet the defendant, although frequently requested so to do, would not and did not, and has utterly failed and refused, and still refuses to convey or cause to be conveyed the said lots to the plaintiff, according to the terms of said agreements, wherefore, and by reason of the premises, the plaintiff says he is injured and has sustained damages to the amount of $20,000.

And the plaintiff claims $20,000, with interest thereon from the first day of November, A. D. 1897.

SAM'L MADDOX,
B. F. LEIGHTON,
Att'ys for Plaintiff.

13 The defendant is to plead hereto on or before the twentieth day, exclusive of Sundays and legal holidays, occurring after the day of the service hereof; otherwise judgment.

SAM'L MADDOX,
B. F. LEIGHTON,
Att'ys for Plaintiff.

(Endorsed:) Leave granted to file. Harry M. Clabaugh, Nov. 1st. 1901.

Amended Declaration.

Filed January 29, 1903.

EDWARD LANDVOIGT, Plaintiff,
vs.
JOSEPH PAUL, Defendant. } At Law. No. 44021.

With leave of the court first had and obtained the plaintiff amends his declaration heretofore filed in this cause by adding the following counts thereto:

1. The plaintiff sues the defendant for money payable by the defendant to the plaintiff for that heretofore to wit: on the 25th day of May, A. D. 1897, the defendant sold to the plaintiff the following real estate situated in the District of Columbia to wit, lots 20 to 24, both inclusive, of Joseph Paul's sub-division of lots 1, 7, 8 and 9, in block 5, of Dobbins' addition to Washington; that the purchase price paid by the plaintiff to the defendant for said real estate was

14 five hundred dollars for each lot of which the plaintiff paid to the defendant two hundred dollars in cash for each lot and gave to the defendant his five promissory notes, one for five hundred dollars and four for two hundred and fifty dollars each, dated on the said 25th day of May A. D. 1897, and payable to one John J. Albright on or before the expiration of five years from the date thereof with interest at the rate of six per centum per annum, and upon the same day the plaintiff executed a deed of trust to said lots in which it was provided that the said lot number 24 should be held to secure the payment of said note for five hundred dollars and one each of the remaining four lots should be held to secure the payment of one of each of the four notes for two hundred and fifty dollars; that said deed of trust was subject and subsequent to a deed of trust to said lot No. 24 to secure a builder's loan of forty-five hundred dollars and a deed of trust to each of said remaining

lots to secure for each a builder's loan of thirty-seven hundred and fifty dollars which plaintiff executed upon the same day to wit the 25th day of May, A. D. 1897; that as a further consideration for the sale of said real estate the plaintiff agreed to erect and construct a dwelling house upon each of said lots according to plans and specifications to be approved by the defendant and to complete the same by the first day of October A. D. 1897; that as a further consideration for the purchase of said real estate upon the same day thereof, to wit, on the 25th day of May, A. D. 1897, and as a part of the same transaction the plaintiff and the defendant mutually agreed by a written instrument signed by the plaintiff and by the defendant under the name and style of "Joseph Paul agent" that if plaintiff should complete the construction of
15 the five dwelling houses hereinbefore described according to plans and specifications to be approved by the defendant by the first of October 1897, he, the defendant, would sell to the plaintiff on or before December first A. D. 1897 five lots of 19.86 by 90 feet each, adjoining said dwellings on the north (the same being lots 15 to 19, both inclusive, of said Paul's said sub-division) for the sum of five hundred dollars each, provided the plaintiff would on or before December first A. D. 1897, begin the erection of five dwelling houses thereon of similar construction to the five buildings first hereinbefore mentioned, or according to plans and specifications to be approved by the defendant and that the plaintiff would complete the said last mentioned five dwelling houses with proper dispatch; and that if the plaintiff should complete the said last mentioned houses by the first day of April A. D. 1898, he, the defendant, would sell to the plaintiff on or before the first day of April A. D. 1898, five other lots of 19.87 by 90 feet adjoining the said last mentioned dwellings on the north (the same being lots 10 to 14, both inclusive of said Paul's said sub-division) for the sum of five hundred dollars each, provided the plaintiff would on or before the first day of April A. D. 1898 begin the erection of five dwelling houses thereon of similar construction or others according to plans and specifications to be approved by the defendant, and that plaintiff would complete the said last mentioned buildings with proper dispatch. And the plaintiff further says that forasmuch as it did not clearly appear from said agreement, of date as aforesaid, of the 25th day
16 of May, A. D. 1897, how the said sum of five hundred dollars should be paid for each of said lots therein described the defendant on or about the first day of November A. D. 1897 made and signed a memorandum in writing and delivered the same to the plaintiff in which memorandum defendant agreed that said agreement of the 25th day of May A. D. 1897, should not be so construed as to require the plaintiff to pay all of the purchase price for said lots in cash but should be so construed as to give to the plaintiff the same terms in the purchase of the said second and third five lots as he had received in the purchase of the said first five lots to

wit: two hundred dollars in cash for each lot and the remainder in promissory notes.

And the plaintiff further says that he proceeded to erect the first five of said dwelling houses according to plans and specifications approved by the defendant but on the first day of October A. D. 1897, he had not fully completed the same and on said day the defendant in writing signed by him extended the time of their completion to the thirty-first day of October A. D. 1897, and that before the said last named day all of said first five dwelling houses were fully completed according to the said plans and specifications.

And the plaintiff further says that after the completion of the said first five houses as hereinbefore described and before the first day of December A. D. 1897, he, the plaintiff, demanded of the defendant a conveyance of the said second five lots provided for in said agreement of the 25th day of May A. D. 1897, hereinbefore described

17 and that at the time the plaintiff made said demand he was ready, willing, and able and has ever since been ready, willing, and able to fulfill and perform all the terms and conditions provided to be done by him in said agreement as construed by said memorandum hereinbefore described but notwithstanding said demand and said agreement the defendant failed and refused and still fails and refuses to convey or cause to be conveyed to the plaintiff either the said second five lots or the said third five lots as provided for in said agreement or any portion of them, wherefore and by reason of the premises the plaintiff has been greatly damaged to wit in the sum of twenty thousand dollars.

And the plaintiff claims from the defendant the sum of twenty thousand dollars with interest from the first day of November, A. D. 1897.

2. The plaintiff sues the defendant for money payable by the defendant to the plaintiff for that heretofore to-wit on the 25th day of May A. D. 1897, the defendant sold to the plaintiff the following real estate, situated in the District of Columbia to wit, lots 20 to 24, both inclusive of Joseph Paul's sub-division of lots 1, 7, 8 and 9, in block 5 of Dobbins' addition to Washington for the sum of five hundred dollars for each lot; and that upon the same day to wit on the 25th day of May A. D. 1897, the plaintiff and the defendant mutually agreed in writing signed by the plaintiff and by the defendant under the name and style of "Joseph Paul agent," that if plaintiff should erect and complete the construction of a dwelling house on each of the five lots hereinbefore mentioned according to plans and specifications to be approved by the defendant by the first of October 1897, he, the defendant, would sell to the plaintiff on or before the first day of December, A. D. 1897,

18 five lots of 19.86 by 90 feet each, adjoining said dwellings on the north (the same being lots 15 to 19, both inclusive, of said Paul's said subdivision) for the sum of five hundred dollars each provided the plaintiff would on or before the first day of December A. D. 1897 begin the erection of five dwelling houses thereon of

similar construction to the five buildings first hereinbefore mentioned or according to plans and specifications to be approved by the defendant and that the plaintiff would complete the said last mentioned dwelling houses with proper dispatch; and that if the plaintiff should complete the said last mentioned houses by the first day of April A. D. 1897, he, the defendant, would sell to the plaintiff on or before the first day of April A. D. 1898, five other lots of 19.87 by 90 feet adjoining the said last mentioned dwellings on the north (the same being lots 10 to 14, both inclusive, of said Paul's said subdivision) for the sum of five hundred dollars each, provided the plaintiff would on or before the first day of April A. D. 1898, begin the erection of five dwelling houses thereon of similar construction, or others according to plans and specifications to be approved by the defendant and that plaintiff would complete the said last mentioned buildings with proper dispatch.

And the plaintiff further says that he proceeded to erect the first five of said dwelling houses according to plans and specifications approved by the defendant, but on the first day of October, A. D. 1897, he had not fully completed the same and on said day
19 the defendant in writing signed by him extended the time of their completion to the 31st day of October A. D. 1897, and that before the said last named day all of said first five dwelling houses were fully completed according to the said plans and specifications.

And the plaintiff further says that after the completion of the first five houses as hereinbefore described and before the 1st day of December, A. D. 1897, he, the plaintiff, demanded of the defendant a conveyance of the said second five lots provided for in said agreement of the 25th day of May, A. D. 1897, hereinbefore described, and that at the time the plaintiff made said demand he was ready, willing and able to fulfill and perform all the terms and conditions provided in said agreement to be done by him but notwithstanding said demand and said agreement the defendant failed and refused and still fails and refuses to convey or cause to be conveyed to the plaintiff either the said second five lots or the said third five lots as provided for in said agreement or any portion of them, wherefore and by reason of the premises the plaintiff has been greatly damaged, to wit, in the sum of twenty thousand dollars.

And the plaintiff claims from the defendant the sum of twenty thousand dollars with interest from the 1st day of November, A. D. 1897.

SAM'L A. PUTMAN,
Attorney for Plaintiff.

The defendant is to plead hereto on or before the twentieth day, exclusive of Sundays and legal holidays, occurring after the day of the service hereof; otherwise judgment.

SAM'L A. PUTMAN,
Attorney for Plaintiff.

20 No objection to amendment & copy served,
WORTHINGTON, HEALD & FRAILEY,
Att'ys for Def't.

Jan'y 28/03.

Pleas.

Filed February 17, 1903.

In the Supreme Court of the District of Columbia.

EDWARD LANDVOIGHT
vs.
JOSEPH PAUL. } At Law. No. 44021.

1. The defendant for a plea to the first count of the plaintiff's second amended declaration says, that he never promised as alleged.
2. And for further plea to the said first count of said second amended declaration, the defendant says he never was indebted as alleged.
3. And for a plea to the second count of the plaintiff's second amended declaration, the defendant says he never promised as alleged.
4. And for further plea to the second count of said second amended declaration, the defendant says he never was indebted as alleged.

A. S. WORTHINGTON,
Attorney for the Defendant.

21 *Joinder of Issue.*

Filed April 13, 1903.

In the Supreme Court of the District of Columbia.

EDWARD LANDVOIGT
vs.
JOSEPH PAUL. } No. 44021. At Law.

The plaintiff hereby joins issue on the defendant's pleas to the second amended declaration herein filed.

SAM'L A. PUTMAN,
Attorney for Plaintiff.

Memoranda.

February 21, 1905.—Verdict for defendant.
April 3, 1905.—Term prolonged 38 days to settle exceptions.

Supreme Court of the District of Columbia.

FRIDAY, *April* 14, 1905.

Session resumed pursuant to adjournment, Mr. Justice Barnard, presiding.

EDWARD LANDVOIGT, Pl'ff,
vs.
JOSEPH PAUL, Def't.
} At Law. No. 44021.

22 Upon considering the motion of the plaintiff for a new trial, said motion is hereby overruled and judgment on verdict ordered: Therefore it is considered that the plaintiff take nothing by his suit, and that the defendant go thereof without day and recover against the plaintiff his costs of defense to be taxed by the clerk and have execution thereof.

The plaintiff notes an appeal to the appellate court, and his bond for costs is fixed at $100.00.

Opinion of the Court.

Filed April 14, 1905.

In the Supreme Court of the District of Columbia.

EDWARD LANDVOIGT, Plaintiff,
vs.
JOSEPH PAUL, Defendant.
} No. 44021. Law.

In this case a declaration was filed on July 2nd, 1900, to recover damages alleged to have been caused to the plaintiff by the breach of a contract for the sale of certain building lots in Joseph Paul's subdivision of lots, in block 5, of Dobbins' addition to Washington.

The said contract of sale was dated May 25th, 1897, signed by the plaintiff, and by the defendant by the name and style of Joseph Paul, agent. The contract embraced fifteen lots; and it provided that if the plaintiff should complete the construction of five dwelling houses, proposed to be built by him on five of the said lots, according to plans and specifications to be approved by the defend-

23 ant, by the first day of October, 1897, then the defendant agreed to sell to the plaintiff by the first day of December, 1897, five adjoining lots for the sum of five hundred dollars, ($500.00) each; *provided*, the plaintiff should on or before the first day of December, 1897, begin the erection of five dwelling houses, thereon, of similar construction to the five buildings first mentioned, or according to plans and specifications to be approved by the defendant; and that if the plaintiff should complete the said addi-

tional five houses by April 1st, 1898, then the defendant agreed to sell to the plaintiff on or before April 1st, 1898, five other adjoining lots for the sum of five hundred dollars, ($500.00) each, *provided*, that the plaintiff, on or before the first day of April, 1898, should begin the erection of five dwelling houses thereon, of similar construction or according to plans to be approved by the defendant, and that the plaintiff should complete same with proper dispatch.

It is further averred that the said agreement was not to be recorded among the land records of the District of Columbia, and the plaintiff avers that it was not recorded.

The declaration then states that the plaintiff built the first five houses, but not completing the same by October 1st, the defendant on that date agreed that the time for completion should be extended to October 31st, 1897, and that before that date they were completed.

The declaration then avers that a supplemental, or explanatory agreement, in writing, was entered into by and between the plaintiff and defendant, bearing date on or about October 31st, 1897, whereby it was agreed that the plaintiff was to pay two hundred dollars, ($200.00) cash for each of said ten additional lots, and
24 give his notes for three hundred dollars, ($300.00) for each lot, to be secured by a deed of trust, to be subsequent to a trust for the building loan, and that thereafter the said supplemental agreement was lost, and can not be found.

The declaration then avers that in the latter part of October, 1897, it was verbally agreed between the plaintiff and the defendant, that the defendant should sell and convey to the plaintiff, all ten of the said lots, on the said terms, and relying on said agreements the plaintiff procured the said building loan, amounting to forty one thousand dollars, ($41,000.), and ordered the preparation of all necessary conveyances, but the defendant would not then convey the said land, and has ever since failed and refused to convey the same according to the terms of said agreements, although the plaintiff has been ready, able and willing, and offered to perform all his parts of the said agreements.

To this declaration, two pleas were filed; the first stating that the defendant never promised as alleged; and, second, that he was never indebted as alleged.

On November 1st, 1901, the plaintiff by leave of the court, filed an amended declaration. In this, the plaintiff avers that after the execution of the said agreement of May 25th, 1897, and the supplemental or explanatory agreement, in writing, alleging it to be of that same date, that he caused plans and specifications to be made for fifteen dwelling houses to be erected by the plaintiff on the said fifteen lots, which plans were submitted to, and approved by,
25 the defendant. This amended declaration then avers that the plaintiff built the first five houses, fully completing the same according to the plans before October 31, 1897, to which date the time for completion had been extended.

Then the amended declaration avers the further agreement that

the other ten lots were to be conveyed at one time; and the ten houses built, substantially as averred in the original declaration. The character of this agreement, as to being verbal or in writing, is not averred.

The plaintiff says he was ready, and willing to carry out the said agreement to build the said ten houses; and that he had a profit therein, of some twenty-five hundred dollars ($2,500.) per house, if they had been built; that he had made all arrangements for building the same, having secured a loan, and made contracts for material and labor necessary for the purpose; and that the defendant refused to convey the said ten lots.

The same character of pleas was filed to this amended declaration.

On January 29th, 1903, a second amended declaration was filed, purporting to be additional counts to the previous declaration. The first count of this second amended declaration, describes the contract of May 25th, 1897, and how the first five lots were conveyed; and the purchase money therefor paid, or secured to be paid; and how the houses thereon were to be constructed; and avers that on or about the first of November, 1897, the defendant executed a supplemental or explanatory agreement with reference to the terms of payment of the five hundred dollars, ($500.00), for each of the
26 other ten lots embraced in said alleged agreement. It then avers the erection of the five houses, as in the previous declaration; and that after their completion and before December 1st, 1897, the plaintiff demanded a conveyance of the said second five lots, provided for in the said agreement of May 25th, 1897, with which demand the defendant failed to comply; and that the defendant refused to convey to the plaintiff, either the second five lots, or the said third five lots, as provided in said agreement.

The second count of this second amended declaration, describes the said contract of May 25th, 1897; the erection of the first five dwelling houses in accordance therewith before October 31, 1897, as agreed to by the defendant; and then a demand made by the plaintiff, on or before December 1st, 1897, for a conveyance of the said second five lots, provided for in the said agreement of May 25th, 1897; and avers that the plaintiff was ready, and willing to perform all his part of the said agreement, but the defendant refused to convey either said second five lots, or the said third five lots, as provided for in the agreement.

To this second amended declaration, the defendant filed the same character of pleas to each count; and issue was joined, and the cause tried before the court and jury; and at the conclusion of the plaintiff's testimony, on the motion of defendant's counsel, the court instructed the jury to return a verdict for the defendant. Thereupon, a motion for a new trial was filed by the plaintiff's counsel, suggesting three grounds.

27 First. For errors of law in directing the jury to find its verdict for the defendant.

Second. For errors of law in admitting and excluding evidence at the trial.

Third. For other good and sufficient reasons.

Counsel have argued this motion very fully upon the first ground, namely, that the court erred in directing the verdict for the defendant, on the whole testimony presented by the plaintiff.

The right of the plaintiff, under the contract declared upon, to have the second five lots conveyed to him, was a conditional one. It depended on the condition or proviso that the plaintiff should, on or before the first day of December, 1897, begin the erection of five dwelling houses, similar to those on the first five lots, or in accordance with plans and specifications to be approved by the defendant. It was a mutual arrangement, the right to a conveyance for the lots depending upon the commencement by the plaintiff of the houses at a certain time; and it seems to me that the time was a material and essential part of the contract; and if the same was not complied with in that respect it operated to destroy the scheme which was in the minds of both parties when the contract was entered into.

Again, the plaintiff's right to the third five lots was conditional on the building and completion of the second five houses by the first day of April, 1898; and also on the condition that the plaintiff should, on or before April 1st, 1898, begin the erection of five other houses of similar construction, or according to plans to be ap-
28 proved by the defendant, and should complete the same with proper dispatch.

The evidence shows that the plaintiff never complied with these conditions, and for that reason, if for no other, he is not now in a position to ask damages of the defendant for his failure to comply with the said contract.

The plaintiff urges as a reason why he never began the erection of the second five houses, and never completed the same, so as to become entitled to a conveyance for the third five lots, was because the provisions of the said contract were waived, or superseded by a new arrangement between the parties, namely, the agreement to convey the ten lots at once, and without any specific provisions as to the time, and manner of building, or completing, the ten houses; and the evidence shows that this new arrangement was not carried out, but a failure to carry out that would not, in my judgment, revive or reinstate the first contract, the provisions of which had been waived, by mutual consent, in the two important particulars, as to the time of commencing and building the houses, and as to the provision about the character of the houses, or plans and specifications.

If the original contract was waived as to one party, it must also be held to have been waived as to the other; and if its performance was waived by mutual consent, then it seems to me that neither party is in a position to insist, as a matter of right, on the performance of said contract; and this must be so, whether the terms upon which it was waived, were ever carried out or not, provided there

was no agreement that the old contract should be revived for such failure.

29 The evidence fails to show a re-instatement of the old contract of May 25th, 1897, although it appears that a memorandum in writing was made as to the method of payment of five-hundred dollars, ($500.00) per lot, but this would apply to the agreement made in waiver or substitution of the original contract as well as to said contract, and the same does not operate to revive the terms of the contract waived.

After a re-examination of the testimony in this case, and consideration of the arguments of counsel, and an examination of the authorities cited, I am of the opinion that the instruction given to the jury to return a verdict for the defendant was correct, and the motion for a new trial must be overruled.

JOB BARNARD, *Justice.*

Memoranda.

April 28, 1905.—Appeal bond filed.

May 9, 1905.—Bill of exceptions submitted and time to file transcript in Court of Appeals extended to July 1, 1905.

May 15, 1905.—Time to file bill of exceptions extended 30 days.

June 26, 1905.—Time to file transcript in Court of Appeals extended to October 3, 1905.

Sept. 19, 1905.—April term and time to file record in Court of Appeals, extended to November 15, 1905.

30 Supreme Court of the District of Columbia, October 2, 1905.

EDWARD LANDVOIGT, Pl'ff,
vs.
JOSEPH PAUL, Defendant. } At Law. No. 44021.

The plaintiff having heretofore submitted his bill of exceptions to the court, comes here now by his attorneys and prays the court to sign and make the same part of the record, which is accordingly done, now for the date of the trial hereof.

Bill of Exceptions.

Filed October 2, 1905.

In the Supreme Court of the District of Columbia.

EDWARD LANDVOIGT, Plaintiff,
vs.
JOSEPH PAUL, Defendant. } At Law. No. 44021.

At the trial of this cause, the plaintiff, to maintain the issues on his part joined offered evidence tending to prove that he is and for

a number of years has been a contractor and builder in the city of Washington, and that the defendant was the owner of a large tract of land in the city of Washington and District of Columbia, known as Dobbins' addition, lying just to the north of V street and
31 extending out toward Glenwood cemetery and the Soldiers' Home; that the plaintiff was referred to the defendant by a mutual acquaintance sometime in the spring of 1897, when the defendant expressed a desire to sell certain parts of said land and the plaintiff expressed a desire to buy the same and build improvements thereon. Plaintiff further testified that on the 24th day of May, 1897, the defendant sub-divided a portion of his said property, beginning at the north-west corner of 1st and V streets, and extending on 1st street the entire block to W street, by a depth of ninety feet into fifteen lots of, approximately, twenty feet each in front. That on the 25th day of May, 1897, the defendant wrote to the plaintiff the following letter:

WASHINGTON, D. C., *May* 25, 1897.

Mr. Edward Landvoigt:

DEAR SIR: If you should complete the construction of five (5) dwellings proposed to be built by you on five (5) lots 19.87 by 90 feet, at the northwest corner of First and V streets N. W. according to plans and specifications to be approved by me, by the first of October, 1897, I agree to sell you on or before December first, 1897, five lots of 19.86 by 90 feet adjoining said dwellings on the north, for the sum of five hundred dollars each, provided you begin on or before December first 1897, the erection of five (5) dwellings thereon of similar construction or others according to plans and specification- to be approved by me and complete said dwellings with proper dispatch: If said additional five dwellings are completed by April first, 1898, I
32 will sell you on or before April first, 1898, five (5) lots 19.87 by 90 feet adjoining said last five (5) dwellings on the north for the sum of five hundred dollars each, provided you begin on or before April first 1898, the erection of five (5) dwellings thereon of similar construction or others according to plan- and specification- to be approved by me and complete same with proper dispatch.

This offer is made with the distinct understanding and agreement on your part that this letter or proposal shall not be recorded in the office of the recorder of deeds of the District of Columbia.

Executed in duplicate.

Yours truly, JOSEPH PAUL, *Agent.*

the terms of which the same day were accepted by the plaintiff, that the plaintiff paid to the defendant one thousand (1000) dollars in cash, being two hundred (200) dollars upon account of the purchase money for each of the five lots of ground first referred to in said letter; plaintiff further to maintain the issues on his part joined testified that he employed the firm of A. B. Mullett & Son, architects, to prepare for him, and they did prepare, plans and specifications for the erection of fifteen houses upon said fifteen

lots upon said ground in said letter and sub-division referred to; plaintiff also offered in evidence a receipt by the defendant for said one thousand ($1000) dollars, five deeds to the plaintiff from him for said five lots, first mentioned
33 in said letter, five deeds of trust from plaintiff and wife to John T. Arms and Samuel A. Drury, trustees, four of them being for thirty-seven hundred and fifty ($3750) dollars, and the other for four thousand five hundred ($4500) dollars, four deeds of trust to Samuel A. Drury and the defendant, Joseph Paul, as trustees, to secure the sums of two hundred and fifty ($250) dollars each, and one deed of trust for five hundred — ($500) to Samuel A. Drury and defendant Joseph Paul, trustees, to secure to the defendant the sums therein mentioned, all of which conveyances were of said first mentioned five lots of ground, bore date on the 25th day of May, 1897, and were duly recorded among the land records of the District of Columbia. Plaintiff further testified that said first five deeds of trust above mentioned were for the purpose of securing a builder's loans made by Messrs. Arms & Drury to him in order to carry out the terms of his agreement with said defendant for the erection of said first five houses; that the second group of five deeds of trust were for a further advance made by the defendant or J. J. Albright on his behalf for a like purpose, and the third group of five deeds of trust were made to secure the balance of unpaid purchase money of three hundred ($300) dollars on each of said five lots of ground. Plaintiff also offered in evidence the book showing said sub-division of said property fronting on 1st street and running northwardly from V street to W street into fifteen lots of ground, and that he had made his arrangements for the erection of fifteen houses on said fifteen lots, and for the purchase of ma-
34 terials and supplies therefor; plaintiff further testified that finding it impossible to complete said first five houses by the first of October, he applied to the defendant for and received an extension of time for the completion thereof, which is in the handwriting of the defendant, and is in the following words and figures:

Joseph Paul, Real Estate, Le Droit Building.

WASHINGTON, D. C., *Oct.* 1*st*, 1897.

Mr. Edward Landvoigt.

DEAR SIR: The time of completion of the first five houses on corner First and V St. N. W. is extended from Oct. 1, 1897, to Oct. 31st, 1897.

Yours truly, JOSEPH PAUL.

and further testified that said five houses were completed to the satisfaction of the defendant about the middle of October; plaintiff further testified that during said month of October both he and the defendant applied to Messrs. Arms and Drury for building loans aggregating forty-one thousand ($41,000) dollars for the purpose of

constructing ten houses upon the remaining ten lots referred to in said agreement, and that said Arms and Drury agreed to make said loans upon condition that the defendant would guarantee the repayment of the same, or indemnify said Arms and Drury from any loss which might arise from their making said loans; that said loans were to be secured by ten deeds of trust, nine for four thousand ($4000) dollars, and one for five thousand ($5000) dollars, upon the said remaining ten lots of ground.

35 Mr. Paul was present when the loan was made and went to Arms and Drury's with plaintiff and stated that we were ready to go on with the other ten houses. The defendant gave instructions for the preparation of the papers and the papers were all drawn up and we were to go there on Monday morning, November 1st, 1897. That said deeds of trust and notes for principal and interest were prepared under the direction and to the satisfaction of Messrs. Arms and Drury, who were ready, willing and able to make said loan, all of which deeds of trust and notes were offered in evidence by the plaintiff and that the plaintiff and his wife and one of the firm of said Arms and Drury, together with the defendant were all present at the office of Arms and Drury on said first day of November, 1897, when the plaintiff was also ready to sign said papers; that when the plaintiff was about to execute said deeds of trust, together with his wife, and to sign said notes, the following colloquy ensued: "Hold up, Mr. Landvoigt"——

Mr. PUTMAN: Who said that.

A. Mr. Paul. He said: "Hold up, Mr. Landvoigt, I am not ready for you to sign those papers at this time—not now; or I am not ready to go on," or something to that effect. "Don't you sign." He told me not to sign. I looked around and I said: "What's the matter?" "Why," he says, "I am not just ready to convey that ground to you now. I don't think it is best"—something to that effect.

Q. Then what happened? A. Caverly said: "I stayed here all day Sunday to draw those papers up, so you could have them for this morning."

36 Mr. FRAILEY: Who said that?

A. Mr. Caverly—"I worked all day Sunday," or all day the day before. I think it was Sunday. Anyway, he said he worked all day on them and got them prepared. He said: "I wouldn't have done that if I hadn't thought you were going on to-day with them. He seemed to be very much surprised at Mr. Paul, as Mr. Paul and I went there and arranged with Arms and Drury to have those papers there for that morning so we could go on with our contract.

Q. Were you ready to go on at that time? A. Certainly; I was there to sign.

Q. Were you able to go on at that time? A. I was able to carry out my contract.

Q. What happened right immediately after that? What became of Mr. Paul? A. Mr. Paul walked out of the office and went out.

Q. What did you do? A. I said: "I want to know what this means." There was nobody there — could explain it, and there was nothing for us to do but leave. That the Mr. Caverly above referred to was the clerk for Arms and Drury and the person who prepared the said deeds of trust and notes, which the plaintiff and his wife were to have executed; that plaintiff and his wife then went around to Paul's office, which was in the same building as that of Arms and Drury where the following conversation took place: "I (plaintiff) said I was astonished and asked him what this meant. I said Mr. Paul, what is the meaning of this? He said: "Well, you
37 had better wait awhile, I am not ready to go on, and we had better wait awhile." Witness also testified that defendant never gave him any reason at all that he remembers, in fact he knows he did not.

Plaintiff further testified that after the last conversation referred to, he called upon Mr. Samuel Ross, of the firm of Barbour and Ross, and asked him to accompany him to Mr. Paul's office, said Ross being a friend both of the plaintiff and defendant; that Ross did go with him, whereupon the witness testified as follows:

Q. What occurred there? A. He said: "I understand, Mr. Paul, you are not going to let Landvoigt go on with his work." He said "I am down here ready to back him up in this matter, if anything is necessary for me to do. I want him to go on. I have arranged with him to sell him fifteen houses."

Q. Sell him what? A. To sell me the material for fifteen houses. That is what I had contracted with him to do. That was the understanding, that I was to build fifteen, and he wanted me to go on. We had some conversation there with Mr. Paul.

Q. State what that was and what the result of it was as well as you can recollect. State it all to us. A. Mr. Paul said "After thinking this matter over, I do not think it is well for Mr. Landvoigt to go on with his contract at this time." Mr. Ross said: "I think he has done pretty well." He said: "He sold two of those houses before they were completed." He said: "Material is cheap now, and Landvoigt wants to go on." "Well, he says, "let me tell
38 you now. I think we had better wait until we get better railroad facilities out there."

Q. What were the railroad facilities out there? A. The horse cars went to T street.

Q. On what street? A. T and North Capitol. That was two squares below me and one square up.

Q. What was the condition of First street at that time? Was that a paved street? A. First street, was paved, yes.

Q. What kind of a street was V street? A. V street was not opened.

Q. It was not opened from North Capitol to First? A. No, sir.

Q. Now go on and tell me what reasons you can recollect Mr.

Paul gave, all you said and all that Mr. Ross said in the presence of you two, as well as you can. Give all of it. A. They had quite a talk there in regard to me building. Mr. Paul said he thought he knew better about that section that anybody else. He said he thought he was a better one to inform me what to do.

Q. Best for whom to do? A. Best for me; and I said, "Well, I can go ahead with this here work. It is cheap now." Labor and material were cheap at that time; but Mr. Ross says: "Well, I don't see, Landvoigt what you can do. Mr. Paul owns this ground." I said, "I don't see what I can do either, if he won't deed it to me."

39 Well, he said, "you had better wait now until the railroad goes there and you will have better assurance." He said, "I don't want to see Mr. Landvoigt get tangled up in this thing." He seemed to be all looking after my interests at that time, and advising me what was best for me to do. He was very solicitous of that.

Plaintiff further testified that he then went so see his attorney, Mr. John C. Fay, and in consequence of advice received from him, called to see the defendant on November 2nd at his office, with reference to which interview the testimony is as follows:

A. The next day I went to see Mr. Paul.

Q. What did he do then about this? A. We had a talk over the thing, and he was advising me what was best for me to do. He says: "No, you don't want to be hasty about this thing." He says: "We had better wait. We are going to build ten of them together anyhow," and he says, "You had better wait until they get that line out there." He says: "They are going to run an electric line away out North Capitol street to"—I think at that time the Soldiers' Home they were speaking about running it to. Anyhow, out that line.

Q. What did Mr. Paul do with you with reference to this arrangement at this interview? A. I told Mr. Paul he had better give me a writing in regard to this deal. He said the deal was for my benefit, and if he didn't think and know it, he wouldn't have any deal. So he sat down and wrote——

Mr. FRAILEY: If he wrote anything, we had better have it.

Mr. POE: No; we are going to account for the writing.

40 That witness then testified to the loss of the writing which he swore defendant gave him on this occasion and his search therefor for the purpose of laying the foundation for the introduction of testimony tending to prove the contents of said lost writing and without objection on the ground that its loss had not been sufficiently proven to admit said secondary evidence, the witness testified as follows as to the contents of said paper.

By Mr. POE:

Q. I will ask you to state what that writing was that you got from Mr. Paul. A. Ten lots, describing them, would be conveyed to me to be built upon, and the price was to be $500 a lot, and he

would take $300 back of the building loan; and the price of the lot was to be $500.

Q. In whose handwriting was the body of that? A. Mr. Paul wrote it himself, in my presence, and handed it to me. This was one or two days after the meeting in Arms and Drury's office on November 1st 1897.

Plaintiff further testified that the defendant has never conveyed to him any of the lots mentioned in the letter dated May 25th, except the first five lots, and that he did not base his refusal so to convey on the first day of November upon the ground that the plaintiff requested him to convey ten lots at one time instead of five lots and then five lots more, and never gave any other reason for his refusal to convey said lots at that time than those heretofore set out in this bill of exceptions.

Plaintiff to further maintain the issue on his part joined, testified that at frequent intervals between said first of November,
41 1897, and the early part of November, 1898, he made demands upon the defendant for a conveyance to him of said ten lots, and that he was always put off for certain reasons assigned by Mr. Paul which were that it was best for the plaintiff not to go ahead right then and also on account of the railroad facilities. He spoke of the railroads a good many times. This went on until on or about the 9th day of November, 1898, when the plaintiff sent William Kimmel to said defendant to demand of him a conveyance of said property; that he gave said William Kimmel the paper-writing which said defendant had furnished him on the second day of November, and which has since been lost, and five hundred ($500) dollars in cash to give Mr. Paul in connection with this real estate transaction. That said Kimmel the same day returned to him, stating the result of said interview with said defendant, and returned to him the five hundred ($500) dollars. That the day after said Kimmel's visit to the defendant, the plaintiff called upon the defendant and demanded a conveyance of said ten lots, which the defendant declined to make to him; that defendant said on this occasion that said property was for sale and he wanted seventy-five cents (75c.) per foot from me or anybody else. He said he wanted seventy-five — (75c.) from me or anybody else for that ground. That was the price of it; that he made no objection at that or any other time based on the grounds of conveying ten lots to the plaintiff, instead of five lots at a time.

The plaintiff on cross-examination testified when asked if he said he would wait before building the other ten houses when re-
42 quested so to do by Mr. Paul, that Mr. Paul did not have to request him to wait. That Mr. Paul just said wait and that settled the question, and that he had to wait and was waiting yet. That after he, the plaintiff, had seen his attorney, Mr. Fay, and had gone back to Mr. Paul's office on the 2nd or 3rd of November 1897,

that the following occurred with reference to the paper which Mr. Paul gave him at that interview.

Q. I understood you to say that after you and Mr. Ross had had this conversation together you then went to see your attorney? A. Yes, sir.

Q. And after you left Mr. Fay you went back to Mr. Paul's office and Mr. Paul gave you a certain memorandum which was afterwards lost? A. Yes, sir.

Q. I wish you would describe that circumstance a little more fully. A. Mr. Fay told me I had better——

Q. I am not asking you about what Mr. Fay told you. I want you to describe the transaction that occurred between you and Mr. Paul, when Mr. Paul wrote out that paper. A. Well, Mr. Paul said that he thought I had better wait until later to build those houses. He said: "I don't think you had better not get tied up out there with these other houses at present. I think the car line will be out there shortly, and it is best for you to wait." He said: "There will be better facilities for getting to the city. The cars are now drawn by horses and they stop at T street. They
43 are going to run an electric line all the way out, and that will be done very shortly." He said: "That is the best time to sell houses, and in my judgment it is the best time to build them." I argued with him a little about that. I said: "If it is only going to be shortly, as you know, until that line is run out there past V street or till we get rapid transit out there, if it only stops at T street, why not build now and have our houses ready when the car line does come there? We will save the time." I said: "I can get my loan now, and later on I may not." He said: "I think I know what is best for you in this case." I said: "How about this property then? You ought to give me a writing if there is going to be delay of this kind." That writing was very brief. It just said that he would deliver to me the ten lots at the same price and on the same terms as the first—that is $500 cash—$300 for the second trust.

By Mr. POE:

Q. $500 cash? A. No, $500 was the price of the lots, and he was to have $200 cash and $300 back of the builders' loan.

By Mr. FRAILEY:

Q. Mr. Paul sat down and wrote that memorandum? A. Yes, sir.

Q. And handed it over to you? A. Yes, sir.

Q. On your request? A. That was at my request. I don't know whether I had the right to do that or not. I don't know much about the courts, and things.

44 Q. Did you show it to anybody else besides Mr. Kimmel? A. Not to anybody else.

Q. Only Mr. Kimmel and you have seen that paper? A. Yes.

Q. It was a mere memorandum that Mr. Paul wrote out and handed to you? A. Just a memorandum stating what our first contract was; that is all.

Q. It was not a formal contract under seal, where witnesses were called in, or anything of that kind? A. No, sir; I suppose that Mr. Paul wanted to say to me if there was any delay there would be no difference in the transaction.

The plaintiff further testified on cross-examination referring to the $500 which he gave to Mr. Kimmel that Mr. Kimmel brought it back to him. That he also gave Mr. Kimmel the paper just referred to signed and handed him by Mr. Paul at the interview on November 2nd or 3rd, 1897. In reply to the question as to why he gave Kimmel that paper, witness stated that he told Kimmel to see Mr. Paul and tell him that if he would sell plaintiff that ground he would pay him all cash for it.

That Kimmel could take the paper and show Paul where he would not have to take any $300 back of the builder's loan, but get his money cash. That if Paul denied that he said he would sell the lots to plaintiff for $500 that Kimmel could produce this paper. That there was the money and there was the paper and to tell Paul that he, the plaintiff, would pay him the balance in a few days. That in other words
45 he sent Kimmel to Paul in November, 1898, and offered to buy the lots in controversy for $500 cash and that Kimmel was to pay $500 as part payment of that cash and that he, the plaintiff, would pay the balance in a few days, which would be $5,000 in cash. Plaintiff further testified on cross-examination that he and Mr. Paul before Paul signed and handed witness the paper of November 2nd, 1897, which was subsequently lost, had had some controversy as to whether there should be a delay in the building operations contemplated between them. That Paul argued against building at that time and witness argued for it. That after they had had some talk and argued about it Mr. Paul would not let plaintiff have his ground and that he went there and told Paul to give him a writing to the effect that there would be no change. That he told Paul to give him some writing that his payments would be the same and that writing was given by Mr. Paul because he Paul insisted finally upon delay in the building operations. That Paul insisted that it was best to postpone building at that time and the plaintiff argued against it, and that as a result of that argument and that fact that Paul did insist on the delay, he, Paul, at the plaintiff's request signed this paper which has been testified about. That there was nothing said in that paper as to the time in which Mr. Paul was to convey the lots to the plaintiff. That plaintiff made a final demand on the defendant for a conveyance of these lots in November, 1898, in which he defied Paul to sell them to anybody. That under this supplementary paper, so-called, which Mr. Paul

gave plaintiff and which has just been referred to, witness
46 was to build the same buildings that he had built; that there was no time specified in the paper. That was a verbal understanding in regard to the buildings plaintiff was to put up and it was understood. It was the same as his first contract. It was only simply that there would be no change.

Q. It was understood that you were to put up the buildings? A. Certainly.

In response to the question as to whether plaintiff had any money in his hands with which to erect the ten houses in November, 1898, when he made this final demand upon the defendant for the conveyance of the ten lots, the plaintiff testified that he had money to carry out his contract. That he did not remember how much, that he did not think he had the entire amount necessary, but that Mrs. Landvoigt had property which he intended to encumber, if necessary, and that he had spoken to an uncle of his and told him that he would want money to carry out the contract, which uncle replied that he would help him out in anything he wanted. The plaintiff also spoke to Mr. Ross who said he would back him for anything he would do out there. That plaintiff could not remember how much money he had in bank, that he thought it was less than $10,000, but as much as $5,000.

Plaintiff to maintain the issue on his part joined also produced WILLIAM KIMMEL, who testified that he called upon the defendant at the request of plaintiff on the 9th of November, 1898, with the paper-writing, dated November 2nd, 1897, and afterwards lost, and
five hundred ($500) dollars which Landvoigt had furnished
47 him with on that day; that he told Paul that Landvoigt had sent him there to close that deal according to the terms of that contract. Mr. Paul would not take the money.

Q. What did Mr. Paul say to you? A. I do not know just the words, but the substance was that he would not carry out that deal.

Q. Did he tell you under what terms he would carry it out?

Mr. WORTHINGTON: Tell us what was said. Let him give the whole conversation in his own way.

The COURT: Just state what was said.

A. I asked Mr. Paul to carry out that contract, which he said he would not do. Then I told him I would make a deposit of five hundred ($500) dollars on behalf of Mr. Landvoigt, and pay all cash instead of three hundred ($300) dollars on each lot, being under a second trust. That he also declined, and he said he would not sell those lots to Mr. Landvoigt, except at seventy-five (75c.) cents a foot.

Q. Did he say anything about terms? A. I don't remember that he did. I don't remember about that; I am not sure about that.

On cross-examination the witness Kimmel further testified: That prior to the 8th or 9th of November, 1898, when he took the $500 and the paper writing of November 2nd 1897 to Mr. Paul and made demand for the conveyance of the ten lots referred to on behalf of the plaintiff, he had been negotiating with Mr. Paul for the purchase of the same ten lots, although he knew that plain-
48 tiff had some kind of a contract about these ten lots with the defendant.

The plaintiff to further maintain the issues on his part joined also produced as a witness EDWARD F. CAVERLY, who testified that he was employed by Arms and Drury for several years and was their chief man in November, 1897, that he prepared the papers with reference to the contemplated loan of November first, 1897. Witness then produced these papers which were ten unexecuted deeds of trust from the plaintiff and his wife to Arms and Drury, trustees, covering each of the lots in controversy. That they were prepared to secure the building loan on these lots, and that he, the witness, did not prepare any other papers at that time. On cross-examination the witness further testified that his recollection with reference to the meeting of the parties on November first in the office of Arms and Drury was that when the parties were about to sign Mr. Paul came in and said he wanted to speak to the plaintiff personally, and then they went out together and came back in a little while and nothing further was said about the signing of the papers. That then Mr. Landvoigt and Mr. Paul spoke to Mr. Arms about getting the money and making the loan in the spring and that witness heard no objection or anything to indicate any objection on the part of the plaintiff about the matter going over.

The plaintiff to further maintain the issues on his part joined produced as a witness JOHN T. ARMS who testified that he was a member of the firm of Arms and Drury, and that he knew the plaintiff and defendant and remembered the transaction with refer-
49 ence to the proposed building loans hereinbefore referred to. That his firm agreed to make the loans upon the strength of Mr. Paul and Mr. Albright joining in to buy the houses in if they went to sale. On cross-examination referring to the fact that the loan did not go through and the transaction was postponed, the witness testified that his recollection was that both the defendant and the plaintiff gave him the same reason for not consummating the loan, and that that reason was on account of the lateness of the season.

The plaintiff to further maintain the issues on his part, joined, offered in evidence the book from the county surveyor's office showing the boundaries and extent of "Dobbins' addition to the city of Washington," showing that said addition runs from about 100 feet south of V street, on 1st at a point a little west of North Capitol

street all the way out to Soldiers' Home and Glennwood cemetery, and then asked the plaintiff the following questions:

Q. After this property was conveyed, after these first five lots were conveyed to you in May, 1897, I believe you proceeded to build?

Mr. WORTHINGTON: Ask him what he did, please.

The COURT: Did you not go over that the other day?

Mr. POE: No, sir, I am going to ask him on a different line with reference to that.

By Mr. POE:

Q. How much did it cost you to build each one of those houses?

To which question the defendant's counsel objected, on the ground of immaterialty, and the court sustained the objection and refused to allow the said question to be answered, to which action of the court in refusing to permit the witness to answer the question, the plaintiff, by his counsel, duly excepted and prayed the court to sign this bill of exceptions.

The above being in substance all the testimony offered by the plaintiff, and the plaintiff having here closed his case, the defendant moved the court to direct the jury to find a verdict in his favor, which the court did, to which action of the court in granting said motion of the defendant, and directing a verdict in favor of the defendant, the plaintiff then and there excepted wherefore in order that the foregoing matters and things which would not otherwise appear of record, may be made so to appear, and that it may be made known that the foregoing constitutes all the evidence given in the course of the trial of this case, the attorneys for the plaintiff pray the court to sign this bill of exceptions, which hath been settled by agreement and the same is accordingly so signed by the court and made of record this 2d day of October, A. D., one thousand nine hundred and five, now for then.

JOB BARNARD, *Justice*.

CHARLES POE,
Attorney for Plaintiff.
CHARLES L. FRAILEY,
Of Counsel for Defendant.

51 *Order for Record for Appeal.*

Filed October 4, 1905.

EDWARD LANDVOIGT
vs.
JOSEPH PAUL. } At Law. No. 44021.

John R. Young, Clerk.

SIR: You will please make up the record for appeal in the above case and include therein the following:

Original declaration and first & second amended declarations, pleas to last amended declaration, joinder of issue, verdict, judgment, prayer for appeal and allowance thereof, memorandum of approval of appeal bond, all orders prolonging the term and time for settling bill of exceptions and filing transcript on appeal. Opinion of court overruling motion for new trial & the bill of exceptions.

Very truly yours,

SAM'L A. PUTMAN,
CHAS. POE,
Att'ys for Pl'ff.

52 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, } *ss:*

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 51, inclusive, to be a true and correct transcript of the record, as per directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 44021 at law, wherein Edward Landvoigt, is plaintiff, and Joseph Paul, is defendant, as the same remains upon the files and of record in said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 31", day of October, A. D. 1905.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 1624. Edward Landvoigt, appellant, vs. Joseph Paul. Court of Appeals, District of Columbia. Filed Nov. 3, 1905. Henry W. Hodges, clerk.

In the Court of Appeals District of Columbia

OCTOBER TERM, 1905

NUMBER 1,624

EDWARD LANDVOIGT, Appellant

against

JOSEPH PAUL, Appellee

Brief and Argument in Behalf of the Appellant

Charles Poe
Samuel A. Putman
Attorneys and Counsel for Appellant

In the Court of Appeals, District of Columbia

OCTOBER TERM, 1905.

EDWARD LANDVOIGT, Appellant,
vs.
JOSEPH PAUL, Appellee.

General Docket
No. 1,624.

BRIEF AND ARGUMENT IN BEHALF OF APPELLANT.

Statement.

On May 25, 1897, the appellant and appellee entered into the following agreement:

WASHINGTON, D. C., May 25, 1897.

Mr. EDWARD LANDVOIGT.

DEAR SIR: If you should complete the construction of five (5) dwellings, proposed to be built by you on five (5) lots 19.87 by 90 feet, at the northwest corner of First and V streets northwest, according to plans and specifications to be approved by me, by the first of October, 1897, I agree to sell you on or before December 1, 1897, five lots of 19.86 by 90 feet, adjoining said dwellings on the north, for the sum of five hundred dollars each, provided you begin on or before December 1, 1897, the erection of five (5) dwellings thereon of similar construction or others according to plans and specifications to be approved by me and complete said dwellings with proper dispatch. If said additional five dwellings are completed by April 1, 1898, I will sell you on or before April 1, 1898, five (5) lots 19.87

by 90 feet adjoining said last five (5) dwellings on the north for the sum of five hundred dollars each, provided you begin on or before April 1, 1898, the erection of five (5) dwellings thereon of similar construction or others according to plans and specifications to be approved by me and complete same with proper dispatch.

This offer is made with the distinct understanding and agreement on your part that this letter or proposal shall not be recorded in the office of the Recorder of Deeds of the District of Columbia.

Executed in duplicate.

Yours truly, JOSEPH PAUL, *Agent.*

I accept and agree to the above condition that this paper shall not be offered for record in the office of the Recorder of Deeds of the District of Columbia.

EDW. LANDVOIGT.

Witness as to both—

F. E. GIBSON.

(Record, p. 18.)

When this contract was made the appellant was a contractor and builder, and the appellee was the owner of a large tract of unimproved real estate called Dobbin's addition lying just to the north of V Street and extending out toward Glenwood Cemetery and the Soldiers Home. Such a contract was expected by both parties to be of great mutual advantage, and after some negotiations, the appellee had the entire lot fronting on First street northwest, and extending north from V to W streets, subdivided into fifteen lots of the demension set forth in the contract. This subdivision was made on May 24th, (Record, p. 18) and the contract was signed the following day, manifestly with reference to it.

Upon the very day the contract was signed the appellant paid, one thousand dollars in cash, being two hundred

dollars on each of the first group of five lots referred to, securing the balance of the purchase money, to wit: three hundred dollars on each of said five lots by five separate third deeds of trust which were by agreement of the parties postponed and made subsequent to the lien of two sets of deeds of trust, which the appellant put upon the property in order to secure the builder's loan which he made for the purpose of constructing the first group of five houses, (Record, p. 18-19). It will thus be preceived that though the contract is not clear and definite as to how and when the purchase money for the ground was to be paid, the parties themselves by their own contemporaneous written instruments made as a part of the transaction construed and explained their meaning, as to the time when and sums in which the purchase money was to be paid and how the deferred part was to be secured, (Record, p. 18-19).

Upon the execution and delivering of these papers the appellant went to work upon the first group which was by the terms of the contract to be finished by October 1, 1897. On that day they were not quite done and the appellee wrote him a note extending the time until October 31st, (Record, p. 19). They were finished to the satisfaction of the appellee about the middle of October, and no question has ever arisen as to them. During October (it does not appear whether it was before or just after the completion of the first group) both the appellant and appellee applied to Messrs. Arms & Drury (the same gentlemen who had lent the money before) for a loan of forty-one thousand dollars, that is four thousand dollars on each of the nine inside houses and five thousand on the outside or house at the southwest corner of First and W streets. Arms & Drury agreed to make these loans, the appellant and appellee having agreed that it would be better to build the ten houses at once, instead of five at a time as called for by the contract and originally contemplated. There is no dispute as to this, and can be none on this Record, as the

case comes here for review upon the testimony offered by the plaintiff only and is not contradicted. (Record, p. 20). The defendant (appellee) was present when the loan was made and gave instructions for the preparation of the papers, *and the papers were all drawn up.* It was arranged that the parties should meet at Arms & Drury's office on Wednesday, November 1, 1897, for the purpose of executing the papers, and on that day the appellant brought his wife with him to that office for that purpose. The appellee came in and refused to complete the transaction. The testimony shows that the appellant was ready, willing and able to carry out his contract, but that the appellee declined to do so. He gave various reasons for his refusal which are set out in the Record, pp. 20-22. Nowhere is it shown that he denied his obligation to convey to the appellant nor did he claim that the appellant had failed to do everything which he had contracted to do, the claim being that the execution of the conveyances by the appellee must be postponed until some later date. It is further shown that frequently after the first of November the appellant sought for a conveyance of the property and that finally on the 10th of of November, 1898, he went to see the appellee and demanded a conveyance of said ten lots and the appellee then refused finally to make one to him, saying that "said property was for sale and that he (appellee) wanted seventy five cents per foot from me (appellant) or anybody else." No objection was ever made because the appellant asked for a conveyance of the whole ten lots instead of five, as shown, nor that there was no tender of a deed for execution. The refusal was an absolute and final denial of the appellants right to a deed under his agreement. It was also proved that the appellant could have performed his part of the contract at all times and always wanted to do so. The day after the appellee first declined to convey, the appellant went to him and obtained from him a memorandum to the effect that if

there was any delay there would be no difference in the transaction (Record, top of p. 25). This memorandum was lost, but secondary evidence of its contents was made competent by due proof.

Upon the final refusal to convey appellant consulted Counsel and this suit was instituted (Record, p. 1). The original declaration was supplimented by an amended one, and subsequently a second amended declaration was filed. The general issue pleas were filed to each of these declarations, the issues duly made up and at the trial when the appellant had closed his case the appellee moved the Court to instruct the Jury to find its verdict for the defendant, which notice the Court granted. There are some questions as to the lower Courts action in rejecting certain testimony which will be discussed in an appropriate place.

ASSIGNMENT OF ERRORS.

First. The court below erred in granting the motion of the defendant (appellee) to instruct the jury to find its verdict in favor of the defendant (appellee).

Second. The court below erred in sustaining the objection interposed by the counsel for the defendant (appellee) to the question: "How much did it cost you to build each one of these houses?" propounded to the plaintiff (appellant) and the refusal by the Court to permit said witness to answer said question.

For which errors said judgment should be reversed.

ARGUMENT.

The case having been tried upon the issues joined upon, the counts of the second amended declaration (Record, pp. 8–11), it becomes necessary to inquire whether they state correctly the true construction of the contract of

May 25, 1897, and if they do, whether their allegations are sustained by the proof, both as to the breach and consequent damage.

First. Is the contract stated with legal precision? While not set out in its very language, it is submitted that its legal effect could hardly have been more accurately stated. The parties to the contract had just entered into an agreement for the erection of the first group of five houses, the terms of which had been most solemnly agreed upon, and the deeds necessary to carry it into effect had been or were about to be executed and delivered. As part and parcel of the entire plan, the letter from the appellee to the appellant was written and its terms accepted. This, it is submitted, is what the declaration states—no more and no less—except that the pleader alleges performance by the plaintiff and failure on the part of the defendant to perform this obligation and the injury resulting as the legal consequence of such breach.

Second. Are the allegations sustained by the proof? The appellant was a builder and contractor, he was anxious to embark upon an enterprise which looked to him to be promising. The appellee was the owner of a large tract of unimproved land in a territory adjacent to but just beyond the limits of the city. The neighborhood was undeveloped. The erection of fifteen well-built and substantial dwelling-houses would in all probability give an impetus to improvement and development of the entire neighborhood and thus enhance the value of all his property. May it not be that the erection of the five houses about which there has been no dispute, so enhanced the value of the rest of his ground as to give us the true reason for the subsequent refusal of the appellee to carry out his contract. Be that as it may. The record shows that the contract (whether verbal or written), as to the first five houses, was carried out in every detail and the houses accepted by the appellee. What next? The proof shows that about the time of the com-

pletion of these houses, both the appellant and appellee applied for a builder's loan for the construction, not of five, but of the whole remaining ten, and that their application was successful and the loan actually made. While this proof is not identical with the allegations of the declaration as to the demand made by the appellant, it is substantially the same. The contract shows that the fifteen lots were to be improved in three groups of five houses each, the declaration alleges a refusal, upon demand, to convey the second group, and then a refusal to convey the third group. The proof shows not a change in the terms of the contract, but in the mode of its performance and a refusal to perform it at all as to the second and third groups of five lots or as to any lots whatever, not on the ground that a conveyance of more than five lots at a time was demanded, but on the ground that the appellee was unwilling to sell any lots at all *at the contract price.* It is submitted that if the defendant (appellee) had refused to convey the second group, the plaintiff (appellant) would have been justified in considering such a refusal as putting an end to the whole contract, and his right to maintain his action for its breach would have then been ripe and complete.

Rochm *vs.* Horst, 178 U. S., 1.

The proof shows that the defendant (appellee) was unwilling to convey anything, while the plaintiff (appellant) was ready, willing, and able to do what the declaration alleged, or even more, having assented to the modification of the mere manner of the performance of the contract upon which the appellee had insisted. *Volenti non fit injuria.* If there was a breach of the contract, the law implies an injury and damage; but in our view there is proof of an actual damage at least, the difference between the contract price and the value of the property at the time of the breach, which, according to the testimony, is the difference between five hundred dollars per lot, the contract

price, and seventy-five cents per square foot, the value placed upon it by the defendant when he finally refused to convey.

It was contended below that the appellant acquiesced in the refusal by the appellee to convey on November 1, 1897. He swears he did not. He could proceed no further with the buildings, for without the legal title, he could not complete the loan from Arms & Drury with which to buy his material and pay for his labor. However, the contract will bear no other reasonable interpretation; than, that when the first five houses were done and accepted, Landvoigt could go on at once, if he saw fit, with the next five, and similar conveyances would be executed at his request, provided he made up his mind to begin and offered to begin "*on or before* December 1, 1897, the erection of five dwellings thereon of similar construction." This construction of the contract is in accordance with what the parties had done before. It gave Landvoigt a reasonable time to sell the houses he had built, if he should require any, and it limited his right to demand a conveyance for a reasonable fixed time. The construction put upon the contract by the Court below, limited both parties to but one day, to wit., December 1, 1897.

The Court below seemed to think there had been an abandonment of the contract and a substitution of a new one for it, but this is not the proper construction to put upon it. Appellee had agreed "to sell him on or before December 1, 1897, five lots * * * adjoining said dwellings on the north for $500 each, provided you begin on or before December 1, 1897, the erection thereon of five dwellings of similar construction, etc. Appellant had to submit, but he did not acquiese. He was powerless. The Court below in its opinion seems to consider that the option to convey belonged to the appellee and that he could wait until December 1st. We submit that this is not correct.

It was not the plan. The intention of the parties, as shown by the contract, enlightened as that intention is by their conduct, was to "*proceed with proper dispatch.*" How could there be proper dispatch or any proceeding if the title remained in Paul and Landvoigt could borrow no money, in accordance with custom, so usual in such affairs, as to have become common knowledge. Paul insisted that the *performance* of the contract should be postponed, and refused to execute the deeds at the time he had contracted to execute them. Landvoigt had to submit to this, and, having waited a reasonable time, demanded the performance of the contract according to its precise terms, save as to the time, which had been extended by reason of Paul's refusal. Paul refused and Landvoigt brought suit. Paul gave Landvoigt a memorandum merely to show that "nothing would be different." This was not a new contract.

Ogle *vs.* Earl Vane, L. R. 2, Q. B., 275.

Same case affirmed, Ex. Chamber, L. R. 3, Q. B., 272.

Hickman *vs.* Haynes, L. R. 10, C. P., 598.

In Ogle *vs.* Vane, *Supra.* A case of postponement at a vendor's request, it was argued that any agreement for postponement ought to have been in writing to satisfy the Statute of Frauds; but it was held by the Court of Queen's Bench and affirmed by the Exchequer Chamber that there was evidence from which the jury might infer that the plaintiff's delay in ~~giving~~ going into the market was at the defendant's request; and, secondly that, as the evidence went to show, not a new contract, but *simply a forbearance by the plaintiff at the request of the defendant*, the Statute of Frauds did not apply.

Benjamin on Sales, Ed. of 1888.

Bennetts Notes, page 170, *et seg.*

The more frequently and carefully we read the opinion of the learned judge who presided below, the more firmly

are we of the opinion that he was in error both in his construction of the contract and his decision that there was a new one made in substitution for it.

We insist that Landvoigt was entitled to deeds when he demanded them on November 1, 1897, and that Paul broke the contract when he refused to deliver the deeds on that day. Second, that the postponement at Pauls request was not a new contract at all, nor was the memorandum mentioned in evidence—but merely a forbearance by Landvoigt to enforce his right to oblige Paul.

As to the second assignment of error we contend that the question "How much did it cost you to build each one of these houses," should have been allowed. By the very terms of the contract and the occupations of the parties themselves there can be no doubt that all fifteen of the houses were built to be sold at a profit, and that the contract was made with this end in view. Such being the case what better evidence could there be of Landvoigts loss by Pauls delinquency, than proof of the cost of houses of "*similar construction*" built upon adjoining lots of identical front and depth under plans drawn at the same time by the same architects; (A. B. Mullet, Jr., Record, p. 18) and with material to be furnished under the same contract for materials? (Barber & Ross, Record, page 21)?

This is not remote, contingent or speculative profit, but the exact state of facts with reference to which the parties contracted, if a breach should be committed.

> "Hadley *vs.* Baxendale, 9 Exchg 341, 354."
>
> "When two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breech of contract should be such as may fairly and reasonably be considered, either as arising naturally, *i. e.*, according to the usual course of things from such breech of contract itself; or such as may reasonably be supposed to have been in contempla-

tion of both parties at the time they wish the contract as the probable result of the breech of it."

Hetzel *vs.* B. & O. R.R., 169, U. S., 26, 37.

"Of course, in such inquiries, absolute certainty as to the damages sustained is in many cases impossible. All that the law requires is that such damages be allowed as, in the judgment of fair men, directly and naturally resulted from the injury for which suit is brought. This is the rule which obtains in civil actions for damages. They have their foundation in the idea of just compensation for wrongs done. In United States Trust Company *vs.* O'Brien, 143 N. Y., 284, 287-289—which was an action for damages for the breach of certain covenants contained in a lease—Mr. Justice Peckham, speaking for the Court of Appeals of New York, when a member of that Court said: 'It is clear, and so it has been held in many cases, that the rule of damages should not depend upon the form of the action. In all civil actions the law gives or endeavers to give a just indemnity for the wrong which has been done to the plaintiff, and whether the act was of the kind designated as a tort or one consisting of a breach of a contract, is on the question of damages an irrelevant inquiry. As was said by Rapallo, J., in Baker *vs.* Drake, 53 N. Y., 211, 220, the inquiry is what is an adequate indemnity to the party injured, and the answer cannot be affected by the form of the action in which he seeks his remedy.' Again, 'In using the words uncertain, speculative, and contingent, for the purpose of excluding that kind of damage, it is not meant to assert that the loss sustained must be proved with the certainty of a mathematical demonstration to have been the necessary result of the breach of covenant by the defendant. The plaintiff is not bound to show to a certainty that excludes the possibility of a doubt that the loss to him resulted from the action of the defendant in violating his agreement. In many cases such proof cannot be given,

and yet there might be a reasonable certainty founded upon inferences legitimately and properly deducible from the evidence that the plaintiff's loss was not only in fact occasioned by the defendant's violation of his covenant, but that such loss was the natural and proximate result of such violation. Certainty to a reasonable intent is necessary, and the meaning of that language is that the loss or damage must be so far removed from speculation or doubt as to create in the minds of intelligent and reasonable men the belief that it was most likely to follow from the breach of the contract and was a probable and direct result thereof. Such a result would be regarded as having been within the contemplation of the parties and as being the natural accompaniment and the proximate result of the violation of the contract. * * * The proof may sometimes be rather difficult upon the question whether the damage was the just or proximate result of the breach of the covenant. In such case it does not come with very good grace from the defendant to insist upon the most specific and certain proof as to the cause and the amount of the damage when he has himself been guilty of a most inexcusable violation of the covenants which were inserted for the very purpose of preventing the result which has come about."

Wakeman *vs.* Wheeler or 101, N. Y., 205.
Lanahan *vs.* Hoover, 79 Md., 413
Eckington, R.R. *vs.* McDevitt, 191, U. S., 103.
Rochm *vs.* Horst, 178, U. S., 1.

"The rule that damages which are ~~mantained~~ or contingent cannot be recovered does not embrace an uncertainty as to the value of the benefit or gain to be derived from the performance of the contract, but an uncertainty or contingency as to whether such gain or benefit would be derived at all. It only applies to such damages as are not the certain result of the breach and not to such as are the certain result, but uncertain in amount."

This being the law as we understand it the question should have been allowed to be put and answered, its ~~defeat~~ being to show not that an injury *might* have happened but the ~~approval~~ of the damage which *must* happen. ~~demand~~

The question was admissible also for the purpose of showing that if Landvoigt had made a profit on the house already built he would be willing to carry out the contract as to the remaining ones.

We submit that the rulings of the Court brought here for review by our Bills of Exception, were erroneous, and the judgment should, therefore, be reversed.

CHARLES POE,
SAMUEL A. PUTMAN,
Attorneys for Appellant.

Court of Appeals, District of Columbia.

JANUARY TERM, 1906.

No. 1624.

EDWARD LANDVOIGT, APPELLANT,

vs.

JOSEPH PAUL, APPELLEE.

BRIEF ON BEHALF OF APPELLEE.

CHARLES L. FRAILEY,
Attorney for Appellee.

A. S. WORTHINGTON,
Of Counsel.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 20366

Court of Appeals, District of Columbia.

JANUARY TERM, 1906.

No. 1624.

EDWARD LANDVOIGT, APPELLANT,

vs.

JOSEPH PAUL, APPELLEE.

BRIEF ON BEHALF OF APPELLEE.

STATEMENT OF THE CASE.

This case comes before this court on appeal from a judgment for the appellee, defendant in the court below.

On July 2 the plaintiff below filed his declaration seeking to recover damages from the defendant for the breach of a special contract set forth in the declaration (1-4). On November 1, 1901, the plaintiff amended his declaration (4), and on January 29, 1903, amended the last-mentioned declaration by adding two counts (8). The general issue was pleaded to the amended declaration as amended, and a trial was had resulting in a verdict for the defendant by direction

of the court, and judgment thereon, after a motion for a new trial had been overruled, was duly entered.

The case in brief set out in the declaration is that on the 25th of May, 1897, the plaintiff and defendant entered into a contract by which the defendant sold to the plaintiff certain real estate in the city of Washington for which the plaintiff paid $200 cash for each of five lots, the balance of the purchase price, which was $500 per lot, being secured by deeds of trust. That by an instrument in writing the parties agreed on the same day that if the plaintiff should complete by October 1, 1897, the construction of five dwelling houses on the five lots sold, according to plans and specifications to be approved by the defendant, he, the defendant, would sell to the plaintiff on or before December 1, 1897, five adjoining lots for five hundred dollars each, provided the plaintiff would on or before December 1, 1897, begin the erection thereon of five dwelling houses of similar construction to those already built or according to plans and specifications to be approved by the defendant, and would complete the same with proper dispatch; and that if the plaintiff should complete the last-mentioned houses by April 1, 1898, the defendant would sell to the plaintiff on or before April 1, 1898, five other lots adjoining the last-mentioned houses for the sum of five hundred dollars each, provided the plaintiff would begin on or before April 1, 1898, the erection thereon of five dwelling houses like the other houses mentioned or according to plans and specifications to be approved by the defendant(9). It was further alleged in the declaration that because it did not appear from the written agreement described whether the payments for the lots should be in cash or otherwise, a further memorandum in writing was signed by the defendant and delivered to the plaintiff, providing that the payments for the lots should be $200 in cash and the balance secured by deed of trust for each lot, subject to certain other deeds of trust to secure building loans (4-5).

It was then alleged that the time for building the first five

dwelling houses already sold to the plaintiff was extended by the defendant to October 31, 1897, and that the plaintiff erected and built the first five mentioned before that date. It was further averred that as to the remaining ten lots, payment for them should be by part cash and notes secured by deeds of trust for the balance in the manner above stated (6). The plaintiff then alleged that he procured the requisite building loan for the remaining ten houses to be built, and ordered the necessary deeds, etc., and met the defendant on November 1, 1897, for the purpose of executing the same, and that the plaintiff was then and there ready to perform his part of the contract, but that the defendant would not convey or cause to be conveyed the lots to the plaintiff (6).

The declaration further averred that the ten houses when built could have been sold at a profit of $2,500 each, which profit was lost by the refusal of the defendant to carry out the contract of May 25, 1897, and then made certain allegations as to the value of the land, etc. The plaintiff then claimed that he had been damaged $25,000 by reason of the action of the defendant (7).

In the second amendment, containing the counts added to the foregoing amended declaration, the plaintiff makes the same averments with reference to the original contract, and assigns as the breach thereof that after the completion of the first five of the fifteen houses, on or before December 1, 1897, he demanded of the defendant a conveyance of the second five lots provided for in the agreement of May 25, 1897, and that he was ready, willing, and able to perform all the terms and conditions of that contract, and that the defendant refused to convey or caused to be conveyed either the second five lots or the third five lots provided for in the contract above mentioned (10). The second count of the second amendment omits the allegation of the manner in which the lots were to be paid for.

At the trial, as appears from the bill of exceptions, the plaintiff put in evidence the agreement of May 25, 1897, described

in the declaration (18), and testified that he paid the $200 on each of the first five lots. The plaintiff also produced in evidence the five deeds of trust to secure the building loans on the five lots mentioned and certain other deeds of trust securing small amounts which were part of the above-mentioned building loans, and a third set of deeds of trust securing the deferred payments of $300 each on the lots. The extension of time for the building of the first five houses was also duly admitted in evidence. The plaintiff testified that the first five houses were completed by the middle of October, and that he and the defendant applied for building loans amounting to $41,000 for the purpose of constructing ten houses upon the remaining ten lots referred to in the agreement, and that under certain conditions Messrs. Arms and Drury agreed to make the loan (20). That after giving directions to prepare the necessary deeds of trust to secure the proposed building loans, he, the plaintiff, with his wife, went to the office of Arms and Drury, where the defendant met him. The plaintiff testified that when he started to sign these deeds of trust he was stopped by the defendant, who stated that he was not then ready to convey the ground to the plaintiff (20). That the next day he went to see the defendant, who stated that they had better wait until they got an electric line out toward the property, and that the plaintiff then replied that the defendant had better give him a writing in regard to this delay (22). After proper proof showing the loss of that writing the plaintiff testified that the writing was "ten lots, describing them, would be conveyed to me to be built upon, and the price was to be five hundred dollars a lot and he would take three hundred dollars back of the building loan; and the price of the lot was to be five hundred dollars" (22, 23). It further appeared that at frequent intervals between November, 1897 and 1898, the plaintiff made demands upon the defendant for a conveyance of the remaining ten lots, and that he was always put off by the defendant for certain reasons, which were that it was best not to go ahead right then,

and also on account of the railroad facilities. That on the 9th of November, 1898, the plaintiff sent one Kimmel to the defendant to demand a conveyance of the property; that he gave Kimmel the last-mentioned paper writing (the one which was lost), and also gave him five hundred dollars to give to the defendant, and that the day after the visit of Kimmel the plaintiff called upon the defendant and demanded a conveyance of the ten lots, which was refused (23). On cross-examination the plaintiff gave in detail the conversation between him and the defendant with reference to waiting until the car line should be built out in the neighborhood of the property, and testified in substance that they argued the matter, and that as the result of the argument the plaintiff requested the defendant to give him a writing if there should be any delay, and that at his request the defendant gave that writing, which was brief, merely stating that he, the defendant, would deliver the ten lots at the same price and on the same terms as first, that is, $200 cash and $300 deferred payment to each lot (24). The plaintiff also testified that there was nothing in the paper mentioned as to the time in which the defendant was to convey the lots to the plaintiff (26), and that while there was a verbal understanding that the plaintiff was to put up the buildings, there was no time specified in regard thereto in the lost paper (26). Kimmel, who was put upon the stand by the plaintiff, testified that he, on behalf of the plaintiff, requested the defendant to carry out the contract contained in the above-mentioned lost paper, which paper, he, Kimmel, took with him when he went to see the defendant. He also stated that the defendant declined to accede to his requests.

Edward F. Caverly, being produced as a witness, testified on behalf of the plaintiff after producing the ten unexecuted deeds of trust, covering the ten lots in controversy, that they were all the papers that he prepared in reference thereto. He also testified on cross-examination that the plaintiff and the defendant, at the meeting in the office of Arms and Drury on

November 1, 1897, spoke to Mr. Arms of that firm about making the loan for these lots in the spring, and that he heard no objection, or anything to indicate any objection, on the part of the plaintiff to the delay in the matter. Mr. John T. Arms also testified that according to his recollection both the defendant and the plaintiff gave him as a reason for not carrying out the loan at that time that it was on account of the lateness of the season.

ARGUMENT.

I.

No breach of any agreement was properly alleged in the amended declaration, and no breach of any agreement alleged in either the amended declaration or its amendment has been shown by the evidence.

The contract declared on contained the following essential elements:

1. Five certain houses were to be completed on five certain lots on or before the 31st day of October, 1897.

2. On or before the 1st day of December, 1897, five certain other houses on five certain other lots adjoining the first five were to be begun, and this was a necessary prerequisite to the *conveyance* by the defendant of those five lots on or before that specified time.

3. These last-mentioned five houses were to be completed on or before the first day of April, 1898, which was also the limit fixed for the beginning of the erection of five more houses upon five more adjoining lots, the beginning of the construction of which houses was a necessary prerequisite to

the conveyance by the defendant of the last-mentioned five adjoining lots.

4. The price of each lot was fixed at five hundred dollars.

It will be seen by the foregong that the time for the erection and completion of the houses and the time for the conveyance of the land was determined upon absolutely, and was of the essence of the contract, and that the stipulations were dependent.

These essential elements of the contract declared on having been stated, we are naturally led to the inquiry as to what breach of this contract the plaintiff complains of in his declaration. He says in the amended declaration (4-8) that the defendant *on the 1st day of November, 1897,* would not convey the remaining ten lots to him, the plaintiff, although he was ready and willing to carry out his part of the contract (16). It appearing by the agreement of the 25th of May, 1897, that the lots were to be conveyed in blocks of five each, the plaintiff in his amended declaration, on page 6 of the record, in apparent explanation of his allegation of the supposed breach, attempts to allege (in ambiguous terms) that he and the defendant had agreed that all of the above-mentioned ten lots should be conveyed at the same time, and that the plaintiff should begin the erection of ten houses thereon. The refusal to do this, as just said, is the first allegation of the breach of a contract.

The second breach of the contract is set forth in the second amended declaration (8-11) and consists solely of the refusal of the defendant upon demand of the plaintiff to convey to the latter the second five lots described in the contract of May 25, 1897.

We shall take up these two allegations of the alleged breach of contract on the part of the defendant in their order.

First. The amended declaration on page 6 nowhere alleges in the supposed further agreement between the plaintiff and

defendant that all ten lots should be conveyed immediately; that there was any definite time fixed for the conveyance of these ten lots. Therefore the ten lots were to be conveyed either in blocks of five at the time stated in the written memorandum of May 25, 1897, or all ten lots were to be conveyed at some time not fixed upon. If the former, then the plaintiff was not entitled to a conveyance of all ten lots on November 1, 1897. If the latter, then the refusal to convey the ten lots on November 1, 1897, was not a breach of any existing agreement. Therefore, we submit, no breach is set out in the amended declaration, which may possibly be the reason why the second amendment was made, alleging a refusal to convey the lots in blocks of five. There is nothing in the evidence to show any agreement as to the time when the ten lots were to be conveyed except that the defendant and the plaintiff applied for a loan for the construction of the houses. There is no testimony which shows that the defendant agreed that he would convey any land to the plaintiff on November 1, 1897. The evidence fails to substantiate the attempted allegation that the defendant agreed to convey all ten lots at one time, and both the declaration and the evidence, therefore, failed to allege and prove any contract or breach thereof in this regard.

Second. As to the alleged breach of the agreement to convey the second five lots on or before the first day of December, 1897, set out in the last amendment of the declaration, all that the evidence shows is that the plaintiff on the first day of *November*, 1897, went to the office of Messrs. Arms and Drury prepared to execute deeds of trust and notes for *all ten* of the remaining lots mentioned in the agreement of May 25, 1897, five of which by that agreement were not to be conveyed until the following April, and that Mr. Paul on that day requested the plaintiff not to execute the ten deeds and notes because he said he was not then ready to convey to Landvoigt those ten lots. It seems to us the mere statement

of this situation shows that in so requesting Landvoigt not to execute the *ten deeds of trust and notes* on November 1, 1897, there was no breach by the defendant of his contract to convey *five* lots on or before the *first day of December,* 1897, and five more lots on or before April 1, 1898.

Again it is to be remembered that before a conveyance of the *five* lots mentioned in the contract of May 25, 1897, the plaintiff was to begin the erection of the five houses thereon, either similar to the ones already built, or according to plans and specifications approved by the defendant. No evidence of any such beginning of the erection of any such houses was introduced or offered.

II.

The defendant was not bound to convey any lots to the plaintiff until he had received a tender of the purchase price of the lots in question, or so much thereof as may have been agreed upon.

When the parties met in Arms and Drury's office on the 1st of November, 1897, the plaintiff was there with his wife prepared to execute the ten deeds of trust above mentioned, and notes secured thereby, and these deeds *and no other* had been prepared by Mr. Caverly, a clerk in Arms and Drury's office. The evidence fails to show any demand by the plaintiff upon the defendant for any conveyance of the ten lots in controversy and fails to show any tender or any offer to the defendant of the purchase price of these ten lots. It does not appear whether the deeds of trust were to be executed and held until the conveyances by Mr. Paul should have been made *upon receipt by him of the purchase-money;* but certain it is that the evidence is lacking showing any arrangement between the parties to meet for the purpose of having any deeds passed *from Paul to Landvoigt* or for the purpose of Landvoigt *paying any money to Paul.* Indeed, the plain-

tiff says nothing whatever about having any money with him, testifying merely that he was ready and able to carry out his agreement, which statement of the plaintiff when tested on cross-examination with respect to November, 1898, developed the fact that the plaintiff depended upon various persons, such as his wife and his uncle, to come to his aid when necessary.

It has been seen that time was of the essence of the contract described in the declaration, and that the agreements therein contained were dependent. This being so, performance of the contract on the part of the plaintiff was necessary before he could maintain an action against the defendant for a breach of the contract; and it certainly appears from a perusal of the contract that it was not only necessary that he should have begun the erection of houses on the lots which he claims the defendant was obligated to convey to him, but it was also necessary for him to tender the purchase price of the lots, both of these being conditions precedent to the conveyance by Paul of the lots in question. Whether or not he should have tendered the entire $500 for each lot or $200 and notes and deeds of trust for the balance depends upon the agreement of the parties. The evidence shows no arrangement between them other than the $500 a lot mentioned in the agreement of May 25, 1897, until the last agreement (p. 22) was entered into after the parties had met in the office of Arms and Drury on November 1, 1897. It is sufficient, however, to say in this regard that no tender of any kind was made by Landvoigt to Paul of the purchase price of the lots or any part thereof. Where in a contract the covenants or stipulations are dependent, a tender and refusal must be proved before an action can be maintained and the plaintiff recover.

Newman *vs.* Baker, 10 App. D. C., 187-202.
Telfener *vs.* Russ, 162 U. S., 170-180 *et seq.*
Enc. of Law (2d edition), vol 29, page 687, and cases cited in note 1.

There was no tender made on November 1 in Arms and Drury's office. There was none made subsequent thereto on December 1, and none made later which covered ten lots, or even five. When Kimmel went to see the defendant, and demanded a compliance of the new contract, he tendered then but $500, which would not pay the amount agreed upon under that contract for three lots, much less ten. So that the record will be searched in vain for any tender of the purchase price of either five lots or ten lots, whether $200 per lot was required or $500 a lot, the latter being the correct amount necessary at least up to November 1. After that date the above-mentioned new contract, as we shall hereinafter show, changed the situation so that the questions of amounts and tender become under the pleadings immaterial, because the plaintiff is not entitled to recover at all.

Therefore, we submit, that until at least the purchase money alleged to have been agreed upon between plaintiff and defendant had been tendered to the defendant, he was not bound to convey the property to the plaintiff, especially in view of all the other circumstances surrounding the transaction.

III.

The plaintiff was not entitled to recover, because the contract of May 25, 1897, declared upon in the amended declaration and its amendment, was superseded by a new and subsequent agreement, in writing, and any breach of the former by the defendant (which of course is not admitted) was waived by the latter, which was not mentioned or set out in the declaration.

It appears from the evidence that after the transactions occurring in the office of Arms and Drury on the 1st of November, 1897, on the next day Landvoigt called on the defendant and discussed the situation with him (22). The

result of this conversation was that a new agreement was entered into in writing between the parties. This conversation between the plaintiff and defendant containing the discussion can be gathered only from the testimony of the plaintiff upon direct and cross examination. It is in substance as follows: That the plaintiff and the defendant thought over the matter and that the latter was advising Landvoigt what was best for him to do. He said that they had better wait until they got a car line out there (22). The defendant further said, "I think you had better not get tied up out there with these other houses at present. I think the car line will be out there shortly, and it is best for you to wait. There will be better facilities for getting to the city. The cars are now drawn by horses and they stop at T street. They are going to run an electric line all the way out, and that will be done very shortly. That is the best time to sell houses, and in my judgment it is the best time to build them." The plaintiff then argued with the defendant a little about that and said, "If it is only going to be shortly as you know until that line is run out there past V street or till we get rapid transit out there, if it only stops at T street, why not build now and have our houses ready when the car line does get there? We will save the time. I can get my loan now, and later on I may not." The defendant then said, "I think I know what is best for you in this case;" to which the plaintiff replied, "How about this property then? You ought to give me a writing if there is going to be delay of this kind" (24). And again the plaintiff testified on cross-examination that Paul insisted it was best to postpone building at that time, and that he, the plaintiff, argued against it, and that as a result of that argument and the fact that Paul did insist on the delay, Paul, at the plaintiff's request, signed the paper under discussion (25).

It will be seen by the foregoing that after the supposed breach by the defendant, on November 1, 1897, of the contract sued on, the two discussed the situation, and that as a result of discussion and argument, and because there was

going to be a delay in the transaction regarding the ten lots in controversy, the parties entered into a new arrangement which was in the form of a writing signed by the defendant.

We are now brought to the consideration of this writing and what it was.

The only testimony regarding its contents appearing in the bill of exceptions fell from the lips of the plaintiff himself, and again we must refer to several places in his testimony to obtain the full text of the writing which was lost.

In his first statement of it the plaintiff says, in response to a request of his counsel to state what its contents were, "Ten lots, describing them, would be conveyed to me to be built upon and the price was to be $500 a lot, and he would take $300 back of the building loan" (22-23). On page 24 he says: "That writing was very brief. It just said that he would deliver to me the ten lots at the same price and on the same terms as the first, that is $500, * * * $200 cash and $300 back of the builder's loan." And again, he stated in substance (pp. 25 and 26) that under this supplementary paper, so called, which Mr. Paul gave him and which has just been referred to, "Witness was to build the same buildings that he had built; that there was no time specified in the paper. That was a verbal understanding in regard to the buildings plaintiff was to put up and it was understood. It was the same as his first contract. It was only simply that there would be no change."

It will be seen that we are now confronted with a written agreement made after the alleged breach of the original contract sued on, which agreement was made in consideration of the fact that there was to be a delay in the conveyance of the ten lots in controversy and the building of any houses thereon and made at the request of the plaintiff, and which in terms provided that for the sum of $200 in cash and $300 deferred payments, to be secured by deed of trust on each lot, the defendant agreed to convey to the plaintiff the ten lots in controversy, without any time being specified as to when they

should be conveyed and without any statement therein contained as to what kind of buildings were to be erected or when they were to be constructed. It is true the plaintiff says that it was a memorandum saying there was to be no change, and he seems to say this in connection with the oral understanding that he was to put up the same kind of buildings (26), but no time was specified in that regard, as has just been stated.

On this evidence we submit, first, that by this agreement all differences between the parties and of supposed breaches of the contract of May 25, 1897, sued on in the declaration were disposed of and waived. Second, that the new agreement differed from the old one sued upon, in that it provided for the conveyance of *all ten lots* to the plaintiff at no particular time (unless perhaps the following spring was understood verbally between the parties), instead of in blocks of five, at the times mentioned in the agreement of May 25, 1897, and in consideration of the commencement of houses on the lots and their completion with dispatch. Third, that by the new agreement the plaintiff consented to a delay and change in the first agreement, and that if there has been any breach by the defendant of any agreement whatsoever (which is not admitted) it was a breach of the last-mentioned agreement when on the 9th of November, 1898, the witness Kimmel, on behalf of the plaintiff, went to Mr. Paul with the *last* agreement and demanded of him that he should carry out *"that contract"* (26). Fourth, that this new contract not being anywhere mentioned in the amended declaration or the second amended declaration or any of the declarations, the plaintiff is not entitled to recover for any breach of the same, even if he had proved any, which we deny, but could only recover, if at all, upon a breach of the contract sued on in the declaration.

Sheehy *vs.* Mandeville, 7 Cranch, 208-217.

It is therefore submitted that because of the action of the plaintiff in requesting and accepting the last agreement he was not entitled to recover under the declaration or any amendments thereto, because any alleged or supposed breach of the contract sued on was waived by so accepting the new agreement, and any supposed breach of the new agreement was, even if proved, not declared on; and that the court below was right in instructing the jury to render a verdict for the defendant. Indeed, counsel for the appellant comment very little upon, and devote but a few lines to, a discussion of the terms of the subsequent agreement, and the conversation between the parties leading up to its formation and execution. This we think is significant, in view of the fact that the court below took the view that the plaintiff by entering into this last agreement put himself out of court. The argument of appellant's counsel that the paper was a mere forbearance is hardly applicable when it appears that almost all the terms of the first contract were changed or done away with by the later instrument, and that Kimmel testified that he, on behalf of Landvoigt, demanded of Paul a compliance with "that contract," referring to the last agreement, which, when he made the demand, he held in his hand (26).

IV.

The court was right in refusing to allow the question as to the cost of each of the houses upon the first five lots to be answered.

It is thought that it will not be necessary for the court to consider the assignment of error covering this question, but we herewith state briefly our views upon it, in case the court should not agree with the propositions contained in the preceding argument and should order a new trial.

We submit, in the first place, that there was no offer by counsel for the appellant to show either what the cost of each

house was, and that the cost of the houses unbuilt would be the same, or that any contracts were in existence for the sale of the unbuilt houses. Certainly, standing by itself, the question and answer were immaterial, but a greater objection to the question is that if it was intended that the cost of these houses was to be taken as a basis of the cost of the houses to be built, to be followed by evidence showing that when built the houses might have been sold at a profit, then we submit that the evidence was properly ruled out, because any such profits would have been too indefinite and speculative to have been the subject of evidence before the jury. It would have been impossible to say whether the houses would have sold at all, or whether at a sacrifice, or whether at a profit, and, if so, how much.

The Eckington and Soldiers' Home Railway Co. *vs.* McDevitt, 191 U. S., page 103.

In the above case it was sought to recover damages for the breach of a covenant by a railroad company to run its cars at certain times over a right of way granted by the plaintiff, and it was claimed that the measure of damages was the difference in market value between the land with the cars running and the expectation that they would continue to run, and the value of the land without the operation of the cars and no expectation that they would continue to run. The court said (page 113) that in a case like this, "gain prevented is a more accurate term than loss of profits." And the court quoted with approval Sedgwick on Damages (8th edition, volume 1, page 250, section 173):

"Where an injured party claims compensation for gain prevented, the amount of loss is always to some extent conjectural; for there is no way of proving that what might have been would have been. Thus, when the claim is made for compensation for a deprivation of property, it may be that if the property had remained in the owner's control it would have brought no gain."

We therefore respectfully submit that the record discloses no reason or ground why the question as to the cost of the houses should have been answered, and no theory upon which an answer would have been admissible; and even if upon the theory contended for in appellant's brief that it laid the foundation for the offer of further evidence tending to show loss of profits by the plaintiff, then such evidence would have been in itself inadmissible on the ground that profits of the nature sought to be shown were too speculative and problematical to be competent; for in this case not only the amount of the supposed gains or profits, but also whether any gain or profit at all would ensue, would be uncertain.

For all the reasons hereinabove stated, it is submitted that the judgment below should be affirmed.

CHARLES L. FRAILEY,
Attorney for Appellee.

A. S. WORTHINGTON,
Of Counsel.